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ABSTRACT

A brief review of the federal constitutional provisions and equivalent Texas Constitutional provisions for the criminally accused is provided in question and answer form. First Amendment rights related to such matters as freedom of the press, rights of students, picketing, distributing leaflets, state licensing, and obscenity are considered in the first chapter. Chapter two focuses on Fourth Amendment rights: control of police activity, frisking, warrants, informants, consent, exceptions to warrants, and automobile stops. Chapter three, the Fifth Amendment, covers "Miranda" warnings, custody, interrogation, failure to testify, immunity, grand jury proceedings, double jeopardy, acquittal, conviction, and mistrial. Issues covered under the Sixth Amendment include rights of minors, public defenders, self-representation, speedy trial, and public trials. Eighth Amendment coverage includes bail, bond, and cruel and unusual punishment. A chapter on the Fourteenth Amendment focuses on due process, plea bargaining, abortion, and equal protection. The final chapter looks at habeas corpus and bills of attainder. (LP)

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# LEGAL RIGHTS OF THE CRIMINALLY ACCUSED

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1984

# LEGAL RIGHTS OF THE CRIMINALLY ACCUSED

Prepared By
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This pamphlet is not a substitute for the advice of a lawyer, but is designed to assist citizens in learning about their rights in Texas.

# FOREWORD

*Legal Rights of the Criminally Accused* is prepared by the Protection of Liberties Committee of the Texas Young Lawyers Association.

The handbook is a brief review of the federal constitutional provisions and, where appropriate, the equivalent Texas Constitutional provisions, and related federal or Texas statutes. It is not a substitute for the advice of an attorney, but is only intended as a general guide to the citizens of Texas concerning legal rights of the criminally accused.

The Texas Young Lawyers Association gratefully acknowledges the funding assistance of the State Bar of Texas and Texas Bar Foundation. Many hours of hard work were put in by the committee members listed in an effort to provide a useful handbook for those who wish to be more informed on the rights guaranteed those accused of a crime. The editorial assistance of S. Michael McColloch and David W. Coody of Dallas and Professor George E. Dix of Austin is also gratefully acknowledged.

We are hopeful that the distribution and use of this handbook will assist citizens in the State of Texas to appreciate and understand more fully the rights and protections we enjoy as a free people.

Jo Ben Whittenburg

Jo Ben Whittenburg, President 1983-84
Texas Young Lawyers Association

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"Wait a minute, sir! I want to catch 'em, too, but we can't throw EVERYTHING overboard!"

## THE FIRST AMENDMENT

**Q. What does the First Amendment to the United States Constitution say about freedom of speech and freedom of press?**

A. *The First Amendment states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."* This Amendment applies to the States as well through the Fourteenth Amendment.

**Q. What is the doctrine of "prior restraint" and how has it been interpreted under the First Amendment?**

A. *A prior restraint is censorship by the government that stops or limits a publication before it is published.* The freedom of the press clause has been interpreted to make the press largely immune from prior restraints. A great burden is placed upon the government to justify governmental interference with the printing or publishing of any article by any newspaper, magazine, or other publisher.

**Q. How does the general prohibition of prior restraints relate to press coverage of pre-trial hearings and trials in a criminal case?**

A. *Generally, the courts will not permit prior restraints of the press.* In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), the United States Supreme Court set aside a state trial court order which barred the publication of information regarding confessions, admissions, or facts incriminating the accused. The order was held to be an invalid prior restraint, and the Court concluded that other less restrictive measures, such as delaying the trial or moving it to another location with less publicity, would suffice to protect the accused's right to a fair trial and would avoid imposing prior restraints on the press.

Although the Court agreed on the result, there were a number of opinions which made it unclear as to whether the Court would ever allow a trial court to completely prohibit the publication of pre-trial evidence. Such orders are commonly known as "gag orders."

A similar issue was addressed by the Court in *Oklahoma Publishing Company v. District Court*, 430 U.S. 308 (1977), in which a trial

"There's no newspaper this morning — just a bundle of gag orders!"

court had prevented the publishing, broadcasting, or disseminating of the name or picture of a boy who had appeared at a detention hearing in juvenile court on charges of second degree murder. The United States Supreme Court found the order invalid. The Court said that because the press was at the hearing, the media had a right to reveal what its reporters had learned, and that the trial court order was an invalid prior restraint prohibited by the First Amendment.

**Q. Is there a right under the First Amendment for the press to attend pre-trial hearings and trials?**

A. *Yes, but it is not an absolute right.* In *Gannett Company v. DePasquale*, 443 U.S. 368 (1979), the state court entered an order barring the press and the public from attending a pre-trial hearing on a motion to suppress evidence. The trial court had based its order on the buildup of pre-trial publicity which the trial court believed had jeopardized the accused's ability to obtain a fair trial. The United States Supreme Court stated that this trial court order was legal because there was no constitutional right of access to a criminal trial under the Sixth Amendment (which provides a defendant with a right to a public trial) and concluded that at pre-trial hearings, such restraints on the press would often be required to protect the rights of the defendant. The Court also concluded that even if the First Amendment gave the press a right of access, the trial court properly balanced that right against the defendant's right to a fair trial.

In a later case, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the trial court entered an order closing the defendant's entire murder trial (rather than just the pre-trial) to the public and the press. In holding that such order was improper, the United States Supreme Court found a right of access to criminal trials under the First and Fourteenth Amendments.

The case was notable because the trial court entered its order closing the courtroom without holding a hearing in which the press could participate and object if it wished to do so. The Virginia statute at issue authorized closure of the courtroom at the unfettered discre-

tion of the trial court. Although the Court found a right of access under the First and Fourteenth Amendments, the Court's opinions clearly revealed that such right was not absolute and that under some circumstances a trial might be closed.

**Q. Has the prior restraint doctrine been applied in contexts other than freedom of the press?**

A. *Yes.* In cases where a permit or license has been required for a parade, performance or a demonstration, the Court has considered the procedural safeguards available to determine if the implementation of the government's policies constitutes an unlawful prior restraint. For example, in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), a municipal agency refused a license for public exhibition of the musical *Hair* in a municipal auditorium. The Court held that such a prior restraint can be permitted, but that reasonable and prompt judicial safeguards must be available to challenge the restraint. Because such safeguards had not been available, the case was reversed.

HI- TOM JEFFERSON HERE TO EXPLAIN THE FIRST AMENDMENT.
WHAT IT DOES IS TO PROTECT THE RIGHT OF ANYBODY TO SAY FREELY WHAT HE PLEASES— NO MATTER HOW RIDICULOUS, NO MATTER HOW LOATHSOME—
SEDITIOUS NAZIS
—NO MATTER HOW PREJUDICED, SELF-RIGHTEOUS AND OPPRESSIVE— NO MATTER HOW MUCH YOU MIGHT WANNA PUNCH SOME A' THESE BIGOTS RIGHT'A MOUTH—
THE RIGHTS OF JERKS ARE THE RIGHTS OF US ALL.

In a different context, in *Young v. American Mini Theaters*, 427 U.S. 50 (1976), the Court held that a zoning ordinance which provided that an adult theater may not, without a special waiver, be located within a designated distance of other theaters or residential areas, was a permissible prior restraint. The Court reasoned that the ordinance did not prohibit all such theaters and did not regulate content, but rather, regulated the time, place and manner of the showing. In any case where a prior restraint of free speech or press is sought, immediate judicial review must be available.

**Q. Can a prior restraint be justified in instances of national security?**

A. *Probably yes, but the evidence of national security must be very strong.* For example, in *New York Times Co. v. United States*, 403 U.S. 713 (1971), the "Pentagon Papers case," the Court suggests that a prior restraint might be justifiable on national security grounds, but it found that the lower court order barring the publication of the pentagon papers was not justifiable based on the facts.

**Q. Is there a newsman's privilege not to disclose his sources under the First Amendment?**

A. *No.* In *Bransburg v. Hayes*, 408 U.S. 665 (1972), a newsman sought to invalidate a summons to appear before a grand jury. The Court held that there was no privilege under the First Amendment against appearing before a grand jury and answering questions as to the identity of sources of information.

The Court held that the grand jury was an important cog in the justice wheel and there was no basis for holding that the public interest in law enforcement was to be overridden by the provisions of the First Amendment. A number of states have enacted statutes establishing newsman's privileges. However, these statutes have been struck down as unconstitutional under the Fifth and Sixth Amendments which establish rights for a criminal defendant to, among other things, present evidence in his defense.

**Q. Are newspaper establishments subject to criminal searches?**

A. *Yes.* According to *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), newspapers or other forms of news media establishments may be the subject of search warrants for evidence or other material properly sought in a criminal investigation.

**Q. Are there any particular standards of appellate court review that have been applied to First Amendment lawsuits or litigation?**

A. *Yes, basically two.* "*Vagueness*" has been the basis for striking down numerous laws in the First Amendment context, particularly those involving obscenity and restrictions on obtaining licenses for public demonstrations, including parades. A statute which is vague does not clearly define what conduct is allowed and what conduct is prohibited.

The "*overbreadth*" doctrine has also been applied in this contest. This doctrine requires that in order to be valid on its face, a statute must restrict *only* speech that is unprotected by the First Amendment.

A successful vagueness attack was launched on a statute in *Smith v. Goguen*, 415 U.S. 566 (1974). The defendant, who had a small flag sewn on the seat of his pants, was convicted under a statute which made it unlawful to "treat [the flag] contemptuously." In striking down the statute, and reversing the conviction, the United States Supreme Court found that the statute was unconstitutionally vague because it was not clear that his particular conduct of wearing the flag was prohibited.

In *Grayned v. City of Rockford*, 408 U.S. 104 (1972), demonstrators were convicted of violating an antipicketing ordinance and an antinoise ordinance, while demonstrating near a school. The Court found that the antipicketing ordinance was invalid because it violated the equal protection clause in drawing a distinction between labor picketing and other types of picketing.

The Court upheld, however, the antinoise ordinance, which prohibited persons from making undue noise or creating diversions near schools, so as to materially disrupt class work.

The Court held that it was clear what the ordinance prohibited and that it was not unconstitutionally vague or overbroad.

SURE, "FREEDOM OF RELIGION" IS ALL FINE AN' GOOD, BUT···
···TH' GOVERNMENT SIMPLY MUST BRING THESE WEIRDO CULTS UNDER CONTROL···
···NOBODY WANTS TO RESTRICT NORMAL RELIGIONS···
···WE JUST WANT TO WEED OUT TH' DEVIANTS···
BEN SARGENT

**Q. Does the First Amendment protect a person's freedom of belief?**

A. *Yes*. This protection is implicit in the free exercise of religion clause, the free speech clause, and the freedom of the press clause. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the United States Supreme Court held that the state could not expel from its public schools Jehovah's Witness children who refused, upon religious grounds, to salute the flag and recite the Pledge of Allegiance. The Court held that to do otherwise would permit the state to require affirmation of a belief, which is unlawful under the First Amendment.

That ruling was not, however, extended in *Cole v. Richardson*, 405 U.S. 676 (1970), to prevent the government from requiring employees or persons seeking professional licensing to take an oath of allegiance, based upon the governmental interests involved. A result similar to that in *Barnette* was reached in *Wooley v. Manard*, 430 U.S. 705 (1977). In *Wooley*, a Jehovah's Witness objected to being required to

display the state motto "Live Free or Die" on his license plate and obscured the motto on his own license plate. He was convicted of a misdemeanor. In reversing his conviction, the Court held that the defendant was being required by the state to make an ideological statement. The Court found no sufficient compelling state interest to justify such a requirement. In *Spence v. Washington*, 418 U.S. 405 (1974), the Court upheld the defendant's right to make a symbolic statement by hanging a peace symbol on an American flag.

**Q. Does the First Amendment apply to students?**

A. *Yes*. The Court clearly held in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), that freedom of speech and expression, as guaranteed by the First Amendment, is applicable to students. At the same time, however, the Court recognized the authority of the states and school officials to prescribe and control conduct in schools, to prevent disruption of educational discipline.

In *Tinker*, students were wearing black arm bands as a symbol of protest against actions of the United States in Vietnam. In reversing the refusal of lower courts to reinstate students who had been suspended for violating the ban on such arm bands, the Court emphasized that there was no evidence that the forbidden conduct would have materially and substantially interfered with the school's operation.

A similar result was reached in *Healy v. James*, 408 U.S. 169 (1972), where the Court held that the withholding of recognition from a student organization known as Students for a Democratic Society, by a public college administration, violated the students' rights of association under the First Amendment. The Court stated that there had to be a specific finding that the organization's affiliation would adversely affect the school, and the school has the burden of proving that.

Beliefs, alone, cannot legally be the basis for punishment. However, failure to obey the reasonable regulations of a school or college may be a reasonable basis for refusing to recognize a group. Mere advocacy of a philosophy, however, is not an adequate basis for denying recognition to an organization.

It should be emphasized that the college in *Healy v. James* was a state-supported institution. In a private institution which may not be subject to the First Amendment, different standards may apply.

**Q. Is obscenity protected by the First Amendment?**

A. *No*. If something is held to be obscene, it is not considered a protected form of expression under the First Amendment. The United States Supreme Court has imposed a rigorous standard to analyze whether something is obscene. In *Miller v. California*, 413 U.S. 15 (1971), the Court held that to be obscene, the item taken as a whole must appeal to a prurient interest in sex, portray sexual conduct in a patently offensive way, and not have serious literary, artistic, political, or scientific value.

Applying such standard, in *New York v. Ferber*, 102 S.Ct. 3348 (1982), the Court upheld a New York criminal statute which prohibited the knowing promotion of sexual performances by children under the age of sixteen. The Court held that child pornography is unprotected by the First Amendment.

Prior to the *Miller* case, the Court had to determine if material was obscene by evaluating the "community" standards. In *Pinkus v. United States*, 436 U.S. 293 (1978), the Court held that obscenity was to be evaluated according to the standards of the adult community, and not by what would offend persons not yet adults.

**Q. Does a person have a right to picket or distribute leaflets any place he wants to do so?**

A. *No.* It is appropriate for the state to set reasonable restrictions on such picketing or distributions of leaflets. However, there must be prompt judicial review in cases where such licenses or permits are withheld so as to prevent improper prior restraints.

**Q. What areas are "public" under the First Amendment for purposes of analyzing if restraints on free speech are legitimate?**

A. *Those areas dedicated to a public use.* A significant amount of litigation has arisen over this issue. In *Lloyd Corporation v. Tanner*, 407 U.S. 551 (1972), where individuals were barred from distributing handbills in a shopping center, even though they were doing so peaceably, the United States Supreme Court held that the shopping center was not so dedicated to a public use that the owner had to permit the distribution of leaflets unrelated to activity within the shopping center.

If the leafleting was related to the actions of a particular store, the result might have been different. Results different from that in *Tanner* have been reached in cases involving company-owned towns and airports, which are dedicated to public uses. There, activities like leafleting must be permitted, subject to reasonable regulations.

**Q. Can limitations on First Amendment rights be permitted in the context of state licensing?**

A. *Yes.* In *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981), the United States Supreme Court upheld a New York statute which prohibited nude dancing in establishments licensed by the state to sell liquor for

drinking on the premises. The Court held that the rights granted to the states under the Twenty-First Amendment permit them to make restrictions on expression that might otherwise be protected by the First Amendment where the sale of liquor is involved.

**Q. Is it unconstitutional to prohibit the distribution of pamphlets on a military post?**

A. *In* Flower v. United States, *407 U.S. 197 (1972), the United States Supreme Court held that although authorities may be able to restrict general access to a military facility, they may not prohibit the distribution of leaflets on streets from which the public is not excluded.* In *Flower*, the street in question, on a military base in San Antonio, Texas, was used by the public, and the Court held that the military commander could no more prohibit the distribution of leaflets there than could police prohibit leafleting on a public city street.

**Q. Can a person use profanity in public without fear of criminal prosecution?**

A. *No, although in certain contexts, profane speech may be protected.* In *Cohen v. California*, 403 U.S. 15 (1971), the defendant had worn a jacket bearing profane language ("f—— the draft") into the Los Angeles County Courthouse. He said he did so to inform the public of his feelings about the draft. He was arrested under a California statute which prohibited "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct."

The Court held that, Cohen's act was pure speech, not obscenity and not "fighting words", which are inherently likely to provoke a violent action (both of which can be restrained). The words were protected by the First Amendment and the restraint was therefore improper.

A similar result was reached in *Hess v. Indiana*, 414 U.S. 105 (1973), where the defendant was convicted of disorderly conduct because he used profane language during an anti-war demonstration, although not addressing anyone in particular. ("We'll take the f—— ing street later.") The Court found the statement to be protected speech.

In a different context, in *Norwell v. Cincinnati*, 415 U.S. 14 (1973), the Court overturned a conviction based on the defendant's verbal protests at the time of his arrest. ("I don't tell you people anything.") The mere verbal complaining could not be punished, as it was protected under the First Amendment.

## THE FOURTH AMENDMENT

**Q. What does the United States Constitution say about the rights of individuals to be free from government intrusion?**

A. *The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the personal things to be seized."*

**Q. Why was this protection included in the Constitution?**

A. *Particularly troubling to the framers of the Constitution was the fear that the government and its agents, unless specifically prohibited, would*

*arrest persons without arrest warrants, and would enter people's homes or places of business to conduct searches without affording the people due process of law.* It was initially feared that the Federal Government would be the primary transgressor of the people's rights, but in fact, the states were the main violators. By virtue of the Fourteenth Amendment the various states must also comply with the Fourth Amendment.

**Q. Does the Fourth Amendment control the actions of private citizens?**

A. *No, the search and seizure law under the Fourth Amendment governs only government actions.* Whether involving federal or local activity, the Fourth Amendment controls only the actions of government and its agents. The Fourth Amendment does not govern the acts of private individuals. For example, when a shopkeeper wrongfully detains an individual for shoplifting or searches his person for an allegedly stolen item, the Fourth Amendment is not involved. However, when a private person acts as an agent of the government, for example, as an informer, then the Fourth Amendment would be triggered.

**Q. What areas of police activity does the Fourth Amendment govern?**

A. A primary area of police activity that is governed by the Fourth Amendment is *the physical confrontation between the police and an individual, such as arrest or temporary detention.* A second area of police activity that is governed by the Fourth Amendment concerns *police investigation.* This includes searches for and seizures of evidence.

**Q. If the provisions of the Fourth Amendment are violated, what are the consequences?**

A. *Generally when the Fourth Amendment is violated, the "exclusionary rule" is triggered.* This rule was applied by the United States Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961), as a remedy for Fourth Amendment violations. Under this rule, any illegally obtained evidence must be excluded from the trial as well as any

information or other evidence derived from this wrongfully obtained evidence.

**Q. What is the significance of proving the violation of the Fourth Amendment and invoking the exclusionary rule?**

A. *If the critical evidence is not admissible at trial it may be impossible to obtain a conviction.* Many crimes involve the possession of specific items. These items may range from stolen goods to illegal drugs to instruments used in the commission of crime, such as weapons. An entire case may rest upon proving the possession of such items. When a Fourth Amendment violation is proven and the evidence obtained pursuant to the violation is excluded by the courts, it is almost impossible to obtain a conviction. For example, when a person is charged with illegal possession of drugs and if the prosecution is prevented from introducing the illegal substance into evidence, no conviction will be possible.

**Q. When and by whom is the determination made that the Fourth Amendment has been violated?**

A. *The judge or magistrate.* When a person is charged with a crime he may challenge the use of any evidence that might have been obtained in violation of the Fourth Amendment by requiring a "suppression hearing". At this hearing the defendant will seek to prove that the basis of the police officer's search or seizure was either itself a violation of the Fourth Amendment or was made as a result of evidence obtained in violation of the Fourth Amendment. This hearing is purely a determination of the law, so there is no jury. The police officers involved as well as the defendant can testify and be cross-examined. The defendant may also raise this issue at the time of trial by objection to the introduction of the evidence by the State.

**Q. What purpose does the Fourth Amendment serve?**

A. *It protects the privacy interests of citizens.* As stated in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), generally, a search made without a

search warrant is on its face unreasonable and unconstitutional. Therefore, the Fourth Amendment requires, in the absence of a warrant exception, that police first submit their intent to search or seize a person to the proper authorities. The Fourth Amendment places between the police and the people a "neutral and disinterested magistrate". The magistrate (judge) then determines the reasonableness of the proposed search. The clash of interest under the Fourth Amendment comes into play because police usually wish to move quickly, but the principles of the Fourth Amendment require that if the police have time to obtain a warrant, then they should be required to do so.

**Q. Under what circumstances, if any, may the police stop a person on the street?**

A. *Police may briefly detain a person when they have a reasonable suspicion that he has or is committing a crime.* There is nothing in the Fourth Amendment that prohibits the police from approaching a person and asking for identification. Absent reasonable suspicion, however, under *Terry v. Ohio*, 392 U.S. 1 (1968), there is nothing in the Fourth Amendment which permits the police to stop and hold a person and to compel identification. It is important to know that the Fourth Amendment was not intended to serve as a deterrent to legitimate police investigation. If the police are suspicious about a person, they may approach that person and ask that person questions. However, that person is not required to remain with the police or to answer any of their questions. In *Brown v. Texas*, 443 U.S. 47 (1979), the United States Supreme Court required that the police have a reasonable and articulable reason for stopping a person.

**Q. When may the police go beyond mere stopping and questioning a person?**

A. *After the initial stop, which was based on reasonable and articulable suspicion of criminal activity, if the police can point to a reasonable fear for their safety, they may conduct a "frisk" of the person's outer clothing.* The United States Supreme Court decided in *Terry v. Ohio*, 392 U.S. 1 (1968), that if a person who was

legitimately stopped based on reasonable suspicion and was observed to have a bulge in his jacket pocket, and the police pat the person down and feel the bulge to be a hard metal object, they would be justified in reaching into the pocket and retrieving that object. If however, the bulge was felt to be a non-metal object, then in all probability the police would not be justified in either retrieving the object. The "stop and frisk", or pat down procedure, developed as a means for officers to stop persons and then take certain actions to protect themselves. The police officer in a stop and frisk should be required to have a reasonable belief that the person has a weapon in order to justify this frisk.

**Q. Under what conditions will a warrant for a search or an arrest be issued?**

A. *A request for a warrant must be made to a neutral and disinterested magistrate and supported by probable cause.* Even though an issuing magistrate may not have an interest in the case itself, if he has any interest in the warrant procedures at all, he will not be considered as a neutral and disinterested magistrate. For example, in *Connally v. Georgia*, 429 U.S. 245 (1977), a justice of the peace who received money for each search warrant issued was not considered to be a neutral and disinterested magistrate.

In order for the magistrate to be justified in issuing the warrant, he should be shown that there is probable cause for the issuance of the warrant. This does not mean that the magistrate needs to be convinced that the person against whom the warrant is issued is in fact guilty or will in fact be in possession of the which are the subject of the warrant. It is only required that there be probable cause, or that it is more than likely that the person to be arrested is involved in criminal activity or that the items to be seized are at the particular location to be searched.

**Q. What are the requirements of a valid warrant?**

A. *The warrant itself must be specific as to the place to be searched and the items to be seized.* The Constitution does not allow explor-

atory searches. A general warrant which contains no specific description of items subject to the warrant will not satisfy the constitutional requirements of a warrant. In *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979), a warrant which was incomplete, leaving blanks instead of listing the items to be seized, so that it could be filled in after the search was made, was ruled to not satisfy the Fourth Amendment.

**Q. Will information supplied by an informant be sufficient to qualify as probable cause and to justify the issuance of a search warrant?**

A. *A search or arrest warrant may not be issued based only on information that police obtained from anonymous or unidentified persons.* Generally, the information received must be supported by other information indicating its reliability.

YOUR HONOR, THIS IS AN OUTRAGE! MY CLIENT WAS ARRESTED DURING AN ILLEGAL SEARCH OF HIS HOUSE. THEY WOULDN'T LET HIM HAVE A LAWYER, BAIL, AN ARRAIGNMENT OR A TRIAL. THEY CHARGED HIM WITH "CRITICIZING THE AUTHORITIES," BEAT A CONFESSION OUT OF HIM, THREW HIM IN PRISON AND SUMMARILY EXECUTED HIM!!
GOOD LORD! ISN'T THIS AMERICA? WHAT'S GOING ON?
JON SARGENT
UH WE DID IT ALL IN "GOOD FAITH," YOUR HONOR.
WELL, WHY DIDN'T YOU JUST SAY SO?

**Q. Under what conditions may a person waive his rights to the Fourth Amendment requirement of a search or arrest warrant?**

A. One of the exceptions to the requirement that a search or arrest warrant be issued prior to the search, is the consent of the person. *Where a person voluntarily gives his consent to be searched or to be taken into custody, a warrant will not be required.* Consent need only to be voluntary to be an effective waiver of the warrant requirement. Also, in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the United States Supreme Court ruled that it is not required that

a person be warned if he waives his rights to a warrant. He can be subject to prosecution for whatever is found pursuant to a search. However, where consent is obtained by a fraudulent claim of lawful authority, for example, where the police falsely say they have a warrant, and point to papers in the inside breast pocket of their jacket, the consent will not be deemed voluntary.

**Q. Can any other person waive another person's rights to the warrant requirement for an arrest or search?**

A. *In some situations another person can respectively waive another individual's rights to the warrant requirement under the Fourth Amendment.* Generally, a hotel clerk or landlord cannot give consent for a hotel guest or an apartment tenant. The question of consent, however, is determined by the review of all the circumstances. The United States Supreme Court stated in *United States v. Matlock*, 415 U.S. 164 (1974), that roommates sharing an apartment can generally give consent for the common areas to be searched. If each roommate has a separate bedroom, one roommate's consent cannot be used for the search of the other roommate's separate living area. As a general rule where consent is given by a person, who has authority over the area to be searched, that consent is an effective waiver of the absent person's rights. Parents may generally give consent to the police to search through the bedroom or furniture of their child even where the child has not given his consent. Also a mother who finds illegal items in her son's top dresser drawer may turn it over to the police.

**Q. When does the Fourth Amendment protect persons from police activity?**

A. *The Fourth Amendment will apply to police activity, if, at the time of a search, the person had a reasonable expectation of privacy.* If it is determined that a person had a reasonable expectation of privacy in the place searched and the police carrying out the search or arrest did not have a properly issued warrant, then the Fourth Amendment rights of that person may have been violated.

**Q. When does a person have an expectation of privacy?**

A. *Before a person has an expectation of privacy the person must first exhibit a subjective expectation of privacy. The person at the time must expect that what he is doing or where his property is located is private. Secondly, if there is a subjective expectation of privacy, that expectation must be one that society would recognize as reasonable.*

For instance, in *Katz v. United States*, 389 U.S. 347 (1967), the United States Supreme Court found that a person, who enters a phone booth and closes the door behind him to make a telephone call has a reasonable expectation of privacy that the telephone conversation will not be overheard. The person in this case exhibited proper precautions in attempting to maintain the privacy of his conversation.

However, a person who talks with another person and that second person is recording the conversation, no expectation of privacy will be found. The mere fact that the person is communicating with the other person shows that he is not attempting to keep private his conversation and there is always a possibility that the person that he is talking to would reveal the contents of the conversation to a third person.

WE'LL KNOW WHEN YOU ARE SLEEPING,
WE'LL KNOW WHEN YOU'RE AWAKE --
WE'LL KNOW IF YOU'VE BEEN BAD OR GOOD,
SO BE GOOD FOR GOODNESS' SAKE --
BEN SARGENT

A reasonable expectation of privacy is more likely to be found when the expectation is one involving the privacy of one's home or property of a person which is secured and kept out of the public view. When persons go outside their home or expose their property to public view, it is less likely that there is a reasonable expectation of privacy.

**Q. What are the exceptions to the warrant requirement of the Fourth Amendment?**

A. *There are several exceptions to the requirement of a search warrant.* Two exceptions, *consent to search* and the *stop and frisk* exceptions, have already been discussed. The most used and practical exception to the warrant requirement is *a search which follows a lawful arrest.* The search must be incident to the arrest and the arrest itself must be lawful. As a practical matter, police must of course be able to search a person they have placed under arrest. If there is no warrant for the arrest and there is no probable cause for the arrest any search incident to that arrest would be invalid.

Any evidence obtained during a search following an unlawful arrest cannot be used as evidence. An important fact concerning the search incident to arrest has to do with the intensity and area of the search. As a general rule, according to *Chimel v. California*, 395 U.S. 752 (1969), a search which goes beyond a search of a person or of the area under the person's immediate control, is too broad and is held invalid.

One broad exception to the warrant requirement for a search is when emergency circumstances justify a warrantless search or seizure. The term "exigent (emergency) circumstances" indicates that at the time of the search or arrest there existed such conditions that in the event that the search and seizure of the illicit items or the arrest of the person was not made at that time, those items or that person would have been lost to the police. The police are normally required to show that either the suspect or the evidence are imminently about to be transported or otherwise disposed of in order to claim that emergency circumstances existed.

A form of emergency circumstances exists when police are in "hot pursuit" of a suspect. If, for example, a suspect is fleeing from the

police and the suspect then seeks to hide in a private home, the police are not required at that time to break off the pursuit and to seek a warrant. When in hot pursuit, the police may follow the suspect and may conduct a search without a warrant. It is not necessary that the area to be searched belong to the suspect or that the suspect had any ownership interest in the area. However, the police must have probable cause to believe the suspect may be in that area.

Searches of automobiles are usually allowed without warrants. In *United States v. Ross* 456 U.S. 798, (1982), the Supreme Court held that if police stop a car and have probable cause to believe it contains contraband, they may search the vehicle without first obtaining a warrant. Also, pursuant to *New York v. Belton*, U.S. (198), when police arrest the occupant of a motor vehicle they may search the entire passenger compartment incident to that arrest.

**Q. Does the Fourth Amendment protect those persons who are searched at the United States borders?**

A. *Yes, but with limitations.* The protections of the Fourth Amendment are greatly diminished when a person, who is attempting to gain entrance into the United States, is searched at a fixed checkpoint at the United States border. Requiring a vehicle to stop for inspection at a fixed checkpoint, where presumably all vehicles are required to stop, is not a violation of the Fourth Amendment. However, in order to justify a search there must either be a search warrant or probable cause justifying the search. Continued questioning of the occupants of a vehicle at a checkpoint need not be based on any particular reason.

**Q. What Fourth Amendment rules govern the stop of automobiles by police officers?**

A. The stopping of automobiles on public roads are subject to somewhat different rules under the Fourth Amendment. *In* Delaware v. Prouse, *440 U.S. 648 (1979), the United States Supreme Court ruled that the police may not randomly stop an automobile without reasonable suspicion that criminal activity is in progress. However, a roadblock where all vehicles are stopped, might be constitutional.* The distinc-

tion is based on the inherent unfairness of singling an individual motorist out and treating him differently than other motorists without any reason for doing so. The police can question the occupants of a vehicle and conduct a search of a vehicle only if the police have probable cause to believe evidence of criminal activity will be found. Because an automobile is mobile, a less stringent Fourth Amendment application is used, but probable cause is still required if a car is to be detained after the initial stop. Furthermore, considering the fact that an automobile is taken out in public and is visible to all, there is somewhat of a lesser expectation of privacy than would be the case with a private individual in his home.

HEY! THAT GUY'S GOT AN EXPIRED TAG!
WE'D BETTER NAIL 'IM!
OUTATHACAR, MISCREANT!!
FRISK
SEARCH · SEARCH · RUMMAGE
"WHAT IS AT MOST A MERE INCONVENIENCE CANNOT PREVAIL WHEN BALANCED AGAINST LEGITIMATE CONCERNS FOR THE OFFICER'S SAFETY."
– U.S. Supreme Court"

**Q. When does a person have the right to assert a Fourth Amendment claim?**

A. *A person may challenge a search or seizure under the Fourth Amendment only when his own rights have been violated.* Generally, a person must show either a proprietary interest in the item seized or an expectation of privacy in the premises searched.

# FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

## INTRODUCTION

**Q. What is "self-incrimination"?**

A. *"Self-incrimination" is the legal term for the supplying of information about one's self or one's activities which has the tendency to show a violation of the criminal laws.* When one is made by a law enforcement officer to supply this information unwillingly, the self-incrimination becomes compelled. Compelled self-incrimination is prohibited by the Fifth Amendment to the United States Constitution.

This prohibition is broad enough to cover more than compelling one to testify against himself on the witness stand at a trial. It also extends to confessions and other statements which are taken by law enforcement personnel and to the requirement that one produce private papers for inspection. The prohibition applies to the conduct of federal, state, and local officials.

**Q. Why do we have a provision in the Constitution which prohibits compulsory self-incrimination?**

A. *A complete answer to this question would require many pages, and would contain information taken from books on law, history, and government, as the origins of the privilege lie in England, before this country was colonized.* The Fifth Amendment was added to the Constitution in 1791, and the privilege against compulsory self-incrimination has been a cornerstone of our liberties ever since. The answer to the question, "Why have it?", has been summarized by the United States Supreme Court in the case of *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

First, the prohibition against such compulsion prevents one who has been accused of a crime from being placed in the uncomfortable position of choosing between accusing himself, committing perjury by lying about his involvement, if any, or subjecting himself to contempt of court for refusing to make any statement at all.

Second, the prohibition is a reflection of our preference for a system which is accusatorial rather than inquisitorial. In other words, we prefer a system in which the government is required to shoulder the entire burden and prove the accused guilty beyond reasonable doubt, over one which would require the accused to prove his innocence. Thus, the government must bring in its own witnesses to prove guilt, rather than compel the accused to speak against himself.

The privilege is a further reflection of our fear that allowing such statements to be admitted as evidence would encouarge the use of inhumane treatment in order to obtain confessions. This notion is not far-fetched, for at one time, confessions obtained by torture were freely admissible. The faulty theory supporting such admissions was that if one were truly innocent, he would not confess to a crime he did not commit, regardless of what was done to him.

Forbidding the use of such statements also is indicative of our belief in the importance of the individual in our society; that one should remain free of interference from the government unless good cause for disturbing him exists. All units of government are extremely powerful in relation to the individual, and such a privilege aids in the establishment of a fairer balance of power between the two.

## CONFESSIONS, POLICE INTERROGATION, AND MIRANDA WARNINGS

**Q. What is the *Miranda* rule?**

A. *The* Miranda *rule, set out by the United States Supreme Court in the now famous case of* Miranda v. Arizona, *384 U.S. 436 (1966), requires law enforcement officers upon request to provide a suspect with the assistance of an attorney during custodial police questioning. To assure that a suspect may fully exercise this right and the right to remain silent, the Court required that the police inform him of these rights before interrogating him.* Generally, if the officers fail to explain these rights to a suspect upon his arrest, his subsequent responses to their questions cannot be put in evidence

against him at his trial. The rule is summarized by the Court in *Miranda* as follows:

> We hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other, fully effective means are adopted to notify the person of his right of silence and to insure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

On its face, the rule seems simple enough, and anyone who has watched a police show on television has seen many suspects arrested and read their "rights." But real life is different from the television screen, and the situations in which the criminally accused actually find themselves are rarely so well ordered. For example, when is one "in custody" for purposes of this rule? Does the suspect have to be under formal arrest? What about informal questioning by police on the street corner? What is interrogation? If a suspect makes a statement while in custody, but not in answer to a direct question, is that interrogation? What is necessary to have a valid waiver of these rights? These are the areas which will be explained more fully later.

**Q. What is the purpose of this rule?**

A. *The purpose of the* Miranda *rule is to protect an individual's right against self-incrimination.* Earlier, we examined the reasons why a privilege against compulsory self-incrimination was included in the Bill of Rights, by reference to the reasons set forth in *Murphy v. Waterfront Commission*. The "*Miranda* rule" is necessary to further these purposes.

The United States Supreme Court concluded in *Miranda* that:

> [W]ithout proper safeguards, the process of in-custody interrogation of persons suspected of or accused of a crime contains inherently compelling pressures which will work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely.

In other words, the Court is expressly recognizing the fact that without the giving of the required warnings, suspects may, by improper treatment, be led to say things which otherwise they would not.

This is an application of one of the factors set out in *Murphy*: the fear of the use of inhumane treatment, and the desire to maintain a fair balance of power between the state and the individual. The warning must be given in all cases, since officials can only speculate as to how much knowledge of his rights a suspect possesses.

Informing the accused of his right to remain silent is only one requirement of the rule. He must also be told that if he chooses to make a statement, anything he says can be used against him in court. As the United States Supreme Court points out, the purpose of this part of the warning is to make the accused aware of the fact that he is in an adversary situation and that those questioning him are not acting in his interest.

Warning suspects of the consequences of making a statement recognizes the fact that because most people trust the police, the accused will be inclined to talk freely with them in order to "straighten things out." But in the adversary situation, the police may be building a case for the prosecution, and any reliance by

the accused on the police for assistance will be misplaced.

While this section does not deal specifically with the right of the accused to an attorney, it is important to point out that the accused must be informed of his right to speak with an attorney before any questioning, and of his right to have an attorney present during any questioning if he so desires. The accused must also be told that if he wants an attorney but cannot afford one, he has the right to have one appointed at no charge to him. Most importantly the police must honor a persons request for the assistance of an attorney during questioning.

Of course, the accused can waive his rights and give a statement or submit to questioning. If questioning begins, and the accused so desires, he has the right to terminate questioning at any time, and to ask for a lawyer. It should be pointed out here that a waiver or giving up of these rights will not be presumed by the silence of the accused or from the fact that he eventually made a confession.

In *Miranda*, the Court said that "[t]he record must show, or there must be an allegation in evidence which shows that an accused was offered counsel but intelligently and understandingly rejected the offer." In other words, the state has the burden of proving that the accused knew what rights he was waiving, understood the consequences, and made the decision intelligently.

This part of the *Miranda* rule is not limited to confessions, but extends to statements of all types which may be used against a defendant by the state. Nor is there any distinction made between statements which are inculpatory (those which tend to show guilt) and statements which are exculpatory (those which tend to establish innocence). This is in recognition of the fact that exculpatory statements may be false and may be used by the prosecution to show the jury that the witness is unworthy of belief.

**Q. When is one "in custody" for purpose of the *Miranda* rule?**

A. *If one reasonably believes he is not "free to leave," he is in custody even though he may not have been formally arrested or restrained.* There is no doubt that Ernesto Miranda was "in

custody" at the time he made his confession. He had been placed under arrest and was being interrogated with respect to the circumstances of the crime of which he was accused. While the rule set forth in *Miranda v. Arizona* is still applicable today, the Court has not expanded it beyond its original limits. The following cases indicate the restrictive interpretation which has been given to the rule.

In *Oregon v. Mathiason*, 429 U.S. 711, which was decided in 1977, a burglary victim identified Mathiason as a suspect. A police detective left his card at Mathiason's apartment with a note asking him to call. Mathiason called the officer and voluntarily went to the police station for an interview. The officer met him, took him to an office, and informed him he was *not* under arrest. After the officer told him his fingerprints had been at the scene (an untrue statement), Mathiason confessed. He left the police station about one-half hour later without ever having been given a *Miranda* warning.

The United States Supreme Court decided that Mathiason was not "in custody" during the interrogation, reasoning that he had been free to leave the police station at any time during the interrogation. He had gone to the police station voluntarily; he was immediately informed that he was not under arrest; and, after a relatively short interview, he did in fact leave without hinderance.

Mathiason's argument was that he should be considered "in custody" since the interrogation took place in what he called a "coercive atmosphere." The Court rejected that argument by stating that any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply because the police officer is part of the system of law enforcement.

The Court ruled that police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor are warnings required just because the questioning takes place in the police station or because the person being questioned is one the police suspect of having committed a crime.

In *Beckwith v. United States*, 425 U.S. 341, decided in 1976, the Court also found that the defendant was not in custody at the time of interrogation. Beckwith was suspected of income tax evasion, and two agents of the Internal

Revenue Service met with him at his home. Before the interview, they read to him from a card which stated that he could not be compelled to give any information, that any incriminating information he gave could be used against him, and that he had a right to a lawyer. Beckwith consented to the interview, and freely answered questions for three hours. He then went with two agents to his place of business and allowed them to examine the documents which they requested.

Beckwith's Fifth Amendment defense was that because of confusion on the part of taxpayers between the civil and criminal functions of the IRS, he had been placed under "psychological restraints" and was thus "in custody." The Court was not impressed with that argument, stating that it went far beyond the reasoning of *Miranda*.

An analysis of these two cases, *Mathiason* and *Beckwith*, indicates that even if one is in the company of law enforcement personnel, and may feel that he is being "coerced" or psychologically restrained, he will not legally be considered to be "in custody" and entitled to *Miranda* warnings as long as he should reasonably believe that he is free to leave at any time.

**Q. What is "interrogation"?**

A. *"Interrogation" is a question or statement designed to elicit an incriminating response from a suspect.* The *Miranda* warning is required before a suspect is subjected to a custodial interrogation. Once the elements of custody are established, the defendant must be subjected to "interrogation." Obviously, if a suspect is brought to the police station and is subjected to specific questions regarding his involvement in a crime, the *Miranda* rule is applicable and the suspect must be informed of his rights prior to any questioning. But interrogation, like the subject of custody, has somewhat hazy boundaries, and it is not always easy to tell when it has begun.

In the case of *Rhode Island v. Innis*, 446 U.S. 291 (1980), the defendant Innis was arrested for a murder committed with a shotgun. He was advised of his rights and he asked for a lawyer. As he was being driven to the police station, one of the officers commented to his companion that he wished they could find the

missing murder weapon soon, before a child got hold of it and was hurt. The police believed that the weapon had been disposed of near a school for handicapped children. Innis overheard the conversation and said he would take the police to where the gun was located.

The precise question that the United States Supreme Court was called upon to answer was whether the policemen's remark constituted interrogation of the suspect. The Court held that Innis was not being interrogated by the remark. However, the Court also set some guidelines to determine how to answer the question of whether or not interrogation took place. The Court stated that the *Miranda* rule was applicable at any time a person in custody was subjected to express questioning or what the Court called the "functional equivalent" of express questioning. The Court explained the meaning of "functional equivalent" by stating that "any words or actions on the part of the police (other than those normally accompanying an arrest and custody) that the police should know are likely to elicit an incriminating response from the suspect" require the *Miranda* warning to be given first.

Where the result of a police officer's words or actions are unforeseeable, however, he will not be held to have interrogated the suspect. In other words, the "functional equivalent" of interrogation is anything that the police do or say which they know or should know is likely to cause the accused to make a statement indicating he is guilty of the crime of which he is suspected. A majority of the members of the Court were of the opinion that the results of the comment in *Innis* were unforeseen.

**Q. What is "waiver"?**

A. *To "waive" a right is to give it up or relinquish it.* If a suspect confesses or makes a statement at the time he is subject to interrogation, his confession or statement can still be admissible if he has "waived" or given up his right to silence. As the Court said in *Miranda*:

> After such warnings have been given, and such opportunity [for an attorney] afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a

statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

In other words, before the accused can waive his rights, he must know he is doing so.

This court has always set high standards of proof for the waiver of constitutional rights. . . . Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that the accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.

The Court is saying that if the prosecution claims that the accused waived his rights, the burden on the prosecutor to prove such a waiver will be heavy. This burden is due to the great importance placed on the constitutional privilege against self-incrimination. The fact that the accused said nothing is inadequate to show a waiver. The record must clearly show that the accused was informed of his rights and made an intelligent decision not to exercise them.

A recent case, reaffirming the prosecution's burden is *Tague v. Louisiana*, 444 U.S. 469, decided in 1980. There, the police officer testified at trial that he could not remember if the defendant understood his rights at the time he made a statement to police. The Louisiana Supreme Court placed the burden on the defendant to show a lack of capacity to understand, which decision was reversed by the United States Supreme Court. The Court stated that a heavy burden rested on the prosecution to show a knowing and intelligent waiver of the

privilege against self-incrimination, and that the State had not carried its burden of proof.

An important point to remember is that the truth of the confession is not the important issue, but whether it is voluntarily and knowingly made. This is to discourage physical or psychological coercion to extract a confession, whether true or not.

## THE SCOPE OF FIFTH AMENDMENT PRIVILEGE

**Q. Who is entitled to claim the privilege?**

A. *The protection is extended to individual persons and, absent immunity, one cannot be compelled to give a statement to the police or other authorities, nor be compelled to testify against himself at trial.* This is the most common example of "taking the fifth." However, the question, "who is entitled to claim the privilege" can arise in other contexts.

For example, a corporation is a legal entity. It can buy and sell property, sue and be sued, and can even be charged with a crime. It cannot, however, claim the privilege against self-incrimination. The United States Supreme Court case of *Hale v. Henkel*, 201 U.S. 43 (1906), held that an officer of a corporation could not refuse on the basis that the corporation would be incriminated, to testify or produce documents.

This principle has also been applied to unincorporated associations such as labor unions. The Court in *U.S. v. White*, 322 U.S. 694 (1944) said that "[i]ndividuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties, nor to be entitled to their purely personal privileges." The Court went on to say that, if records are held in a representative capacity, they "cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them [the representative] personally."

In other words, the privilege against compulsory self-incrimination has been limited to individual persons acting in their individual capacities. If one is called as a witness in his capacity as the representative of an association,

he cannot claim the privilege as it relates to documents which he is required to produce, even if the information contained in the documents would tend to incriminate him individually as well as the association.

But in *Wilson v. U.S.*, 221 U.S. 361 (1911), the Court drew a distinction between representatives being compelled to produce corporate documents and giving oral testimony.

> They [the custodians of corporate records] may decline to utter upon the witness stand a single self-incriminating word. They may demand that any accusation made against them individually be established without the aid of oral testimony or the compulsory production by them of their private papers.

The Court limited compulsion of representatives to corporate records and documents. As an individual, the representative was still protected from being compelled to make incriminating statements, and was protected from being compelled to produce his own, private papers. The Fifth Amendment protection of private papers has been called into question by the decisions in *Andreson v. Maryland*, 427 U.S. 463 (1976) and *Fisher v. United States*, 425 U.S. 391 (1976). These cases indicate that a person may be compelled to produce his private papers although they do not specifically decide the question.

**Q. What about private papers in the possession of another?**

A. *Even if private papers in a person's possession may be protected by the Fifth Amendment, such protection does not exist where the papers are transferred to someone else.*

In *Couch v. United States*, 409 U.S. 322 (1973), the defendant Couch was accused of tax fraud. Her records were in the hands of her accountant and a subpoena was issued to the accountant, compelling him to produce the records. Couch claimed that this violated her privilege against compulsory self-incrimination.

The United States Supreme Court did not agree. Its opinion stated that the Fifth Amendment privilege was a personal one, that it applied to the person, and not to the information

itself. The Court said; "A party is privileged from producing the information [himself], but not from its production [by someone else]."

In summary, the Court held that the purpose of the privilege is to prevent the witness from being compelled to testify against himself. It does not mean that incriminating information cannot be compelled from another source. Here, the subpoena was directed to the accountant, and the accused was not compelled to do anything. It is the compulsion of the accused personally that is objectionable.

**Q. Is there anything one *can* be compelled to disclose?**

A. *Yes, a person can be required to disclose physical characteristics such as blood or handwriting.* As we have observed in answers to previous questions, the protections of *Miranda v. Arizona* extend only to custodial interrogations. It was stated in *Schmerber v. California*, 384 U.S. 757 (1966), that "[t]he prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him." Yet the case went on to hold that the prohibition did not extend to excluding his body as evidence when relevant to the case.

Schmerber was arrested for driving while intoxicated and blood was taken from him without his consent. The results of the tests performed on the blood showed that he was intoxicated and these results were admitted into evidence at his trial. The Court ruled that such admission did not violate Schmerber's Fifth Amendment privilege.

The privilege, the Court explained, provides no protection from being compelled to submit to fingerprinting, photographing, or measurements. The accused may be required to stand, to walk, to assume a stance, or make a certain gesture. The Court explained that while the privilege bars compelling "communications" or "testimony," the privilege is not violated when police reasonably make a suspect the source of physical evidence.

Another rather interesting case along these lines is *Garner v. United States*, 424 U.S. 648 (1976). On his income tax return, Garner listed his occupation as "gambler." Some of the dis-

closures made in the tax return were incriminating, and Garner was prosecuted. In his defense, his argument was that since the tax return was *required* to be filed by law, the information was compelled and thus could not be used against him without violating his Fifth Amendment privilege.

The Court was not swayed by Garner's theory and ruled that if he made incriminating responses to questions instead of refusing to answer because of self-incrimination, the disclosures were not compelled. The Court stated:

> Unless a witness objects, a government may ordinarily assume that its compulsory processes [the required filing of the tax return] are not eliciting testimony that he deems incriminating. Only the witness knows whether the apparently innocent disclosures sought [by the government] incriminate him, and the burden lies with him to make a timely assertion of the privilege.

The implication of the Court is for a person in Garner's position to assert the Fifth Amendment privilege on the tax form.

**Q. Can the prosecutor comment at trial on the failure of the accused to testify?**

A. *No.* Assuming that the proper immunity has not been granted, the accused has the right to maintain his silence all the way through his trial. Not only may he remain silent, but any comment on his failure to testify is improper.

In *Griffin v. California*, 380 U.S. 609 (1965), the defendant had been convicted of murder. The judge instructed the jury that while the defendant had a right not to testify, the jury could draw an inference that what he would have said would have been unfavorable. The Court reversed Griffin's conviction, and stated that such a comment on his refusal to testify violated his Fifth Amendment privilege.

The Court recognized that such comments were a hold over from the inquisitorial systems of justice and were prohibited by the Fifth Amendment. In its opinion, the Court explained that such a comment was "a penalty imposed by the courts for exercising a constitutional privilege. It cuts down on the privilege by mak-

ing its assertion costly." This is impermissible. The Court recognized that a jury might well draw an inference from the silence of the accused in any event; but, "[w]hen the court solemnizes the silence of the accused into *evidence against him* that is an entirely different matter." [emphasis added]

Not only is it improper for the court to comment on the failure of the defendant to testify, the case of *Carter v. Kentucky*, 450 U.S. 288 (1981), held that if the defendant requests it, the court is *required* to give an instruction to the jury that they are not to use his silence as an inference of guilt. In that case, the defendant requested and was denied the following instruction to the jury: "The defendant is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way." While recognizing, as did the Court in *Griffin*, that it was impossible to prevent the jury from drawing an inference from the silence of the accused, the United States Supreme Court noted that a trial judge nevertheless has a powerful tool in such an instruction to the jury to counter the effects of such jury speculation as the reasons for an accused's silence.

**Q. Can testimony be compelled or production of papers be ordered if immunity is given?**

A. *The answer to this question is "yes", but immunity can be given only by a prosecutor who has the legal authority to do so, not a policeman.*

The case of *Kastigar v. United States*, 406 U.S. 441 (1972), established the present guidelines for immunity, known as "use immunity." This means that the information which the accused provides under a grant of immunity cannot be used directly or indirectly against him in any way. It does not mean, however, that he cannot be prosecuted for that crime if the government is able to obtain evidence from another independent source, besides the witness.

The Court, in *Kastigar*, found that use immunity was "coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." The Court recognized that the privilege "has never been construed to mean that one who invokes it cannot subse-

quently be prosecuted [if evidence is available from another source]."

## THE FIFTH AMENDMENT

### GRAND JURY

**Q. What is the function of the grand jury?**

A. *The purpose of a grand jury is to determine whether there is probable cause to begin the prosecution of an individual.* In all Texas felony and federal felony cases (in which an accused could possibly be incarcerated in a penitentiary) the accusation process must be initiated with an indictment by a grand jury unless waived by the accused. The grand jury may also return a charge in a misdemeanor case, but rarely does so.

**Q. What is the purpose behind the requirement of a grand jury?**

A. *To protect individuals from unfounded criminal prosecution.* The tradition of the grand jury was brought to America by the colonists. English in origin, its purpose was to provide a fair procedure for instituting criminal proceedings against an individual to "weed out" malicious accusations or those based on insufficient evidence.

**Q. What is the difference between a grand jury and a regular or petit jury?**

A. *A regular jury or petit jury may sit in the trial court in both civil and criminal cases.* It is the purpose of the petit jury to hear the evidence and to determine specific fact issues in that particular case. A grand jury usually hears evidence in many different criminal *matters only and its decision is to determine whether there is sufficient evidence to formally charge the arrested person with a crime.*

**Q. What Amendment contains the requirement for a grand jury?**

A. *Although the Fifth Amendment to the United States Constitution contains a requirement for*

*grand juries, this is one of the few constitutional requirements which has not been incorporated into the Fourteenth Amendment and therefore is not binding on the states. Texas, however, has a requirement of grand juries which is found in Article 1 Section 10 of the Texas Constitution.*

**Q. How does the grand jury proceeding work?**

A. *In a grand jury proceeding the prosecutor presents evidence to the grand jurors through the testimony of witnesses or through written reports.*

**Q. Does a witness or a person being accused have the right to have his or her attorney present during the proceeding?**

A. *No.* The attorney may remain outside the grand jury room, however, and be consulted as often as necessary outside the hearing of the grand jury.

**Q. Can the person claim the Fifth Amendment prohibition against self-incrimination while being questioned before the grand jury?**

A. *Yes.* The prohibition against self-incrimination applies until, and unless, the prosecution grants a witness immunity. After that time the witness may not claim the right to withhold testimony incriminating himself or herself. (For more information on immunity, see the preceding section.)

**Q. What are the possible outcomes of a grand jury proceeding?**

A. *The grand jury may either "indict" an individual which means that the jury believes there is sufficient evidence to find "probable cause" and to proceed with the accusatory process. Alternatively, the grand jury may "no bill" the individual which means that the grand jury believes that there is insufficient evidence or lack of probable cause to charge the individual.*

*"subject for the same offense to be twice put in jeopardy of life and limb. . . ."* The prohibition against double jeopardy has been applied to the states through the Fourteenth Amendment to the United States Constitution. The constitutions of individual states, such as Texas, also contain such provisions.

**Q. Does double jeopardy apply as soon as a person is arrested?**

A. *No.* That point after which a person may not be placed in double jeopardy is sometimes denoted as "attachment". Attachment does not occur until an individual is actually brought to trial. The point of attachment depends upon whether the trial is to the court sitting alone or to a jury. If the trial is to the court alone, (heard only by a judge) jeopardy does not attach until the first evidence is offered by the prosecution. Where, however, the trial is to a jury, attachment occurs as soon as a jury has been impaneled.

**Q. If a person is acquitted at trial can that individual be tried again for the same offense he was charged with in the first trial?**

A. *No.* Once a defendant is acquitted at trial he may not be tried again for the same offense. He may be tried again for a similar offense if the prosecution is required to produce additional evidence or to prove additional elements. If the second charge depends upon facts which were found in the defendant's favor at the first trial, the favorable finding is binding on the State under the doctrine of "collateral estoppel" in the second trial and the State may not meet its burden of proving each element of the offense.

For example, if a defendant is charged with robbing one of five people in a card game and is found not guilty of the charge because there is insufficient evidence of identity, then he cannot be tried for robbing another one of the people at the *same* card game. This is because a jury has found against the government on a fact question (namely, was the defendant the one who did it?), which fact the prosecution would have to again establish in order to get a conviction for robbing a second person. Because the jury has found that the defendant

THERE REALLY IS A SERIOUS CRIME PROBLEM, SIR - BUT I'M AFRAID WE CAN'T JUST LET THE POLICE RUMMAGE AROUND HOUSES OR LET THE COURTS TRY PEOPLE TWICE -
WHAT'S GONNA STOP US NEXT? SOME KINDA LIBERAL, WISHY-WASHY WIMPY-JUDGE LEGAL TECHNICALITIES?
WELL, TAKE THE 4TH AND 5TH AMENDMENTS -
- THE WHAT?
- OF THE CONSTITUTION -
- THE WHAT?
SUDDENLY EVERYTHING IS BECOMING VERY CLEAR -

# FIFTH AMENDMENT

## DOUBLE JEOPARDY

**Q. What exactly does double jeopardy mean and why do we have it?**

A. *The term "double jeopardy" denotes the concept that a person should not be subjected to the hazards of trial and possible conviction and punishment more than once for an alleged offense.* As the United States Supreme Court stated in *Benton v. Maryland*, 395 U.S. 784 (1969);

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that, even though innocent, he may be found guilty.

**Q. What is the source of the double jeopardy protection?**

A. *The constitutional prohibition against placing an individual in double jeopardy is contained in the Fifth Amendment to the United States Constitution, where it states that no person shall be*

was *not* the robber at the card game, the government cannot relitigate or retry that issue. According to *Ashe v. Swenson*, 397 U.S. 436 (1970), that would be double jeopardy.

**Q. If a defendant is acquitted at trial, can he be tried for some other offense which he is accused of committing during the same incident?**

A. *It depends upon whether the other offense requires proof of an additional fact which the first did not require.* If there is an additional fact, generally a defendant may be prosecuted unless one of the facts necessary for conviction on the other charge has necessarily been found in the defendant's favor by the jury. For example in *Brown v. Ohio*, 432 U.S. 161 (1977), the defendant had been charged with operating an automobile without the owner's consent ("joyriding"). The defendant admitted his guilt and was sentenced to thirty days in jail and a fine of $100. After he was released from jail, Brown was charged in another county with stealing that same automobile. The United States Supreme Court decided that the double jeopardy clause prevented prosecution and punishment for the crime of stealing that same automobile because the offense of joyriding required no proof beyond that which is required for the offense of auto theft.

**Q. If a defendant is convicted of a crime, can he be tried for another offense arising out of that incident?**

A. *Again, it depends on whether the offense is clearly a separate offense. If it is simply a lesser included offense of the first offense, the defendant cannot be tried again.* However, there is no absolute bar to multiple convictions and punishments in the *same* trial where the legislature intended the crimes to be punished separately. This is true even if one of the crimes is included in the proof of the other.

**Q. Suppose a person is convicted and, on appeal, the appellate court reverses the conviction due to insufficiency of evidence. Can that person be tried again for that offense?**

A. *No.* If the appellate court reverses a conviction based on the lack of evidence, it may be treated as an acquittal by the jury and the same rules apply.

**Q. Suppose a person is convicted of an offense but, on appeal, the court reverses the conviction because the lower court made a procedural error such as allowing the prosecution to produce evidence which should have been excluded. Can that person be retried for the same offense?**

A. *Yes.* Only in those cases where the reversal is based on the sufficiency of the evidence is the second trial barred.

**Q. If a person is acquitted by a jury during the first trial, can the State appeal that acquittal?**

A. *No.* The prosecution is always prohibited from appealing an acquittal by a jury.

**Q. Can a person be retried for the same offense if, upon trial of the offense, a mistrial is declared?**

A. *The answer to this question depends upon whose motion the mistrial is declared.* A mistrial occurs when a trial is terminated before its normal conclusion. If a mistrial is declared at the request of the defendant, a second trial may be had when the defendant was forced to ask for a mistrial by flagrant conduct of the prosecution. If a mistrial is declared at the request of the State or by the court's own motion, a second trial may be had only in those instances where the mistrial can be said to have been of "manifest necessity". Examples of manifest necessity would be a hung jury, where the jury is unable to make a decision, or when trial, due to the illness of an important witness or the judge, may not proceed.

**Q. Is it possible for a person to be tried for a crime and also conspiracy to commit that same crime?**

A. *Yes.* Conspiracy is a separate offense from the crime itself and an accused, therefore, may be tried for both the crime committed and the con-

spiracy to commit the crime. The crime of conspiracy involves the agreement between two or more persons to commit an unlawful act or an unlawful act in an unlawful manner and movement towards effecting that plan by one of those parties.

**Q. Can an accused be tried for a crime in the state court and also in federal court?**

A. *Yes.* If the offense constitutes both a state and federal crime, he may be tried under the jurisdiction of each court.

**Q. Can a juvenile be tried for an offense as a juvenile and later tried as an adult for the same offense?**

A. *No.* Double jeopardy applies regardless of the age of the defendant.

**Q. If a defendant successfully appeals a conviction and the appellate court reverses the conviction on grounds other than the sufficiency of the evidence (so that a second trial cannot be held), can the defendant receive a greater sentence upon retrial?**

A. *It depends on who sets the punishment. If the court (judge) sets the punishment after the second trial, the second sentence cannot be greater than the first sentence if the defendant has done no wrong between the first and second trials. If, on the other hand, the jury sets the second punishment, it can be greater.*

## THE SIXTH AMENDMENT

### RIGHT TO COUNSEL

**Q. Does an accused have a right to have a lawyer appointed to represent him in a criminal case if he cannot afford a lawyer?**

A. *Generally, yes.* The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." Although throughout most of our country's history it was believed that this guarantee only applied when an individual was

charged with a federal crime, in 1963 the United States Supreme Court interpreted the Sixth Amendment to also guarantee the assistance of counsel when a criminal charge is based on a violation of state law. By virtue of the decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963), today any individual charged with a state or federal crime has the right to be represented by an attorney, whether or not he has the money to pay for an attorney.

**Q. Under what circumstances may a person be entitled to the appointment of a lawyer to represent him?**

A. *The United States Supreme Court has interpreted the Sixth Amendment in* Argersinger v. Hamlin, *487 U.S. 25 (1972), to prohibit the imprisonment of any individual who has not been afforded the assistance of counsel.* However, the Sixth Amendment also has been interpreted in *Scott v. Illinois*, 440 U.S. 367 (1979), not to require the appointment of counsel for a criminal defendant who is charged with a statutory offense for which imprisonment upon conviction is authorized but not required. In light of the decisions in *Argersinger* and *Scott*, today both federal and state law provide a qualified right to the appointment of counsel, if a person cannot afford to hire counsel. For example, in most traffic offenses, because imprisonment is not provided for by the statute, a person is not entitled to an appointed lawyer.

A federal statute provides that counsel may be appointed if the crime charged is more than just a petty offense and the court determines the defendant is financially unable to obtain counsel. Similarly, under most state law, an individual may have counsel appointed if the crime charged is punishable by imprisonment and the court determines the defendant is too poor to employ counsel.

**Q. Is a person's right to have a lawyer appointed to represent him affected by the fact he is a minor?**

A. *No.* The United States Supreme Court has ruled *In Re Gault*, 387 U.S. 1, 18 (1967), "that in juvenile delinquency proceedings which may result in commitment to an institution, the child and the child's parents must be notified of the

child's right to be represented by counsel retained by them, or, if they are unable to afford counsel, that counsel will be appointed to represent the child."

**Q. What is the earliest point in time during a criminal prosecution that a person becomes entitled to the assistance of counsel?**

A. *The United States Supreme Court has developed the concept of "a critical stage in a criminal prosecution" as being the point in time when an individual's Sixth Amendment guarantee of the assistance of counsel arises. Generally, "a critical stage in a criminal proceeding" is any point at which adversary criminal proceedings are initiated against the individual.*

**Q. Is a police lineup a critical stage in a criminal prosecution?**

A. *Perhaps, but it depends on when the lineup is held.* A police lineup is a procedure used to allow victims of crimes or witnesses to identify the offender from a group of persons. The case of *Kirby v. Illinois*, 406 U.S. 682 (1972), held that a lineup, conducted before a person is charged with a crime, is not a critical stage in a criminal prosecution so there is no requirement that the accused be appointed counsel prior to the lineup. On the other hand, a lineup which occurs after the person has been charged is considered a critical stage and the accused must be afforded counsel or any identification made in the lineup will not be admissible in court.

**Q. Is a pre-indictment interrogation a critical stage of a criminal prosecution?**

A. *Yes.* In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Court held that an individual's Sixth Amendment guarantee of the assistance of counsel has been violated, where a criminal investigation has focused on a particular suspect who has been taken into police custody and interrogated without the opportunity to consult counsel. Today, the *Escobedo* decision is still valid, but the Court linked the right to be represented by counsel at preindictment interro-

gations to the Fifth Amendment guarantee against self-incrimination in *Miranda v. Arizona*, 384 U.S. 436 (1966) (See the discussion of the Fifth Amendment above.)

**Q. Is a preliminary hearing a critical stage in a criminal prosecution?**

A. *Yes.* The United States Supreme Court decided in *Moore v. Illinois*, 434 U.S. 220 (1977), that a preliminary hearing is a critical stage in a criminal prosecution because such hearing marks the initiation of adversary criminal proceedings against an individual. During a preliminary hearing, the individual is formally informed of the charges against him by a judge.

**Q. Is a defendant entitled to the assistance of counsel during the sentencing stage?**

A. *Yes.* The case of *Townsend v. Burke*, 334 U.S. 736 (1948), held that counsel is required at the sentencing stage. In addition, the case of *Mempa v. Rhay*, 389 U.S. 128 (1967), held that if sentencing is deferred and the convicted placed on probation, counsel must be afforded at any hearing to revoke the probation and impose the deferred sentence.

**Q. Is the defendant entitled to the assistance of counsel if his case is appealed?**

A. *Yes.* In *Griffin v. Illinois*, 351 U.S. 12 (1956), the United States Supreme Court stated that the Constitution prohibits structuring the criminal justice system in such manner as to disadvantage poor and indigent defendants who cannot afford counsel. On the basis of this interpretation, the Court held in *Douglas v. California*, 372 U.S. 353 (1963), that since an affluent defendant can retain counsel for an appeal, an indigent defendant has a right to have counsel appointed to prosecute his appeal.

**Q. Must an individual request an attorney if he thinks he is entitled to the appointment of counsel?**

A. *Technically, no.* When the assistance of counsel is mandated by the Sixth Amendment there is no requirement that the accused request counsel. As a practical matter, however, since

one's liberty, and possibly one's life, is at stake in a criminal prosecution, any individual faced with a criminal proceeding should request the assistance of counsel immediately.

**Q. Can a defendant waive his constitutional right to the appointment of counsel?**

A. *Yes.* However, when a constitutional guarantee such as the right to counsel is involved, mere silence in the criminal proceedings is insufficient to establish a waiver. In *Carnley v. Cochran*, 369 U.S. 506 (1962), the United States Supreme Court decided that it must appear in the record of the hearing that the defendant was offered counsel and knowingly and intelligently declined representation.

**Q. If the court determines that a defendant is entitled to the appointment of an attorney can he decline counsel and represent himself?**

A. *Yes.* In *Faretta v. California*, 422 U.S. 806 (1975), the United States Supreme Court ruled that the Sixth Amendment guarantees a constitutional right of self-representation, and that any individual can defend himself provided his election to do so is voluntarily and intelligently made.

**Q. If there are multiple defendants in a criminal prosecution, is each defendant entitled to the appointment of an attorney?**

A. *Not necessarily, unless there is a conflict of interest between defendants with the same lawyer.* The United States Supreme Court decided in *Glasser v. United States*, 315 U.S. 60 (1942), that one's Sixth Amendment right to the assistance of counsel is not violated by the mere fact one's attorney is also representing other defendants in the same trial. The Sixth Amendment is only violated if it is shown that the multiple representation places the attorney in a position of representing interests that are so conflicting that the defendants' right to independent counsel is endangered.

Furthermore, this conflict of interest must be shown to be an actual conflict as opposed to a mere possibility of conflict. Furthermore, a de-

fendant may not be able to personally select the attorney of his choice.

**Q. Is a defendant entitled to effective representation by his court appointed lawyer?**

A. *Yes.* The Sixth Amendment guarantee of "assistance of counsel" was first interpreted to guarantee "effective assistance of counsel" in *Powell v. Alabama*, 287 U.S. 45 (1932). The United States Supreme Court stated in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), that assistance of counsel must be "adequate" to comply with the requirements of the Sixth Amendment.

**Q. Is a court appointed lawyer subject to a different standard of effective representation than a privately retained lawyer?**

A. *No.* Historically, in determining whether a defendant had been effectively represented, courts made a distinction between retained and appointed counsel. In fact, many early cases denied the defendant post-conviction relief for ineffective representation by retained counsel on the ground the defendants' choice in some way made him responsible for the representation received. The United States Supreme Court has since abolished that distinction in *Cuyler vs. Sullivan*, 444 U.S. 823 (1980), stating that there is "no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers."

**Q. When can a defendant raise the issue of ineffective representation of counsel?**

A. *An individual can raise the issue of ineffective representation in a number of post-conviction proceedings. Some of the proceedings in which the issue can be raised include a motion for a new trial, error on appeal, or a petition for habeas corpus.* It should be noted that the method and manner of bringing each of the foregoing actions varies depending on applicable federal or state law.

**Q. Does a defendant have any remedy against a court-appointed attorney who he felt was guilty of malpractice in conducting the defense of his case?**

A. *Yes.* A court-appointed attorney, whether in a federal or state case, may be sued for legal malpractice under the law of the state in which the services were rendered. Furthermore, the United States Supreme Court ruled in *Ferri v. Ackerman*, 444 U.S. 193 (1979), that federal law does not provide immunity or defense from a claim of malpractice based upon state law for an attorney appointed under federal law to represent an indigent defendant in a federal case.

**Q. Does a defendant have a right to be informed of the criminal charges against him?**

A. *The Sixth Amendment to the Constitution of the United States provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation."*

**Q. At what stage of a criminal proceeding must the accused by informed of the charges against him?**

A. *As a practical matter, the first time an individual is informed of the charges against him is at the time of arrest. Formally, the accused must be fully informed of the charges at a hearing required which is held before a magistrate within a reasonable time after arrest.*

**Q. Does an accused have a right to examine, in court and under oath, those persons who testify against him?**

A. *Yes.* The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

**Q. Are there any circumstances under which the testimony of witnesses which the defendant cannot examine may be used against him?**

A. *Yes.* The Sixth Amendment guarantee of the right to confront witnesses appears absolute on its face, and the United States Supreme Court held in *Kirby v. United States*, 156 U.S. 237 (1895), the right to be one of the fundamental

guarantees of life and liberty. However, there are numerous exceptions to the general rule.

An example of the majority of federal and state law exceptions to the right to confront witnesses is found in the federal rule which provides that even if a person is unavailable as a witness, certain testimony given in prior proceedings, statements made under the belief of impending death, statements against one's self interest, and statements of personal or family history may be admitted in evidence. In addition, there are certain circumstances under which the court may admit additional statements of an unavailable witness if such evidence is necessary to further the interests of justice.

**Q. Can an accused waive the right to confront witnesses against him?**

A. *Yes.* The United States Supreme Court, in *Brookhart v. Janis*, 384 U.S. 1 (1966), decided that an individual can waive the right to confront witnesses whose testimony is used against him provided the waiver is uncoerced and is knowingly and intelligently made.

**Q. Does a defendant have a right to a legal process to compel witnesses to appear and testify?**

A. *Yes.* The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." As with the previously discussed Sixth Amendment guarantees, this provision has also been interpreted to apply to criminal proceedings based on violations of state law.

**Q. By what process are witnesses notified they must appear in court?**

A. *Witnesses are notified that they must appear in court by serving them with a subpoena.* A subpoena is a written command to appear at a certain date and time to testify about the case named in the subpoena. Subpoenas are usually served on the witnesses by a sheriff or other individual authorized by the court.

**Q. Does a defendant have any legal remedy if a witness refuses to respond to a subpoena?**

A. *Yes.* If a witness refuses to obey a subpoena, the court can order the sheriff or marshal to arrest the witness and he may be fined, imprisoned, or both.

## THE SIXTH AMENDMENT

### RIGHT TO SPEEDY AND PUBLIC TRIAL

**Q. What does the Sixth Amendment to the United States Constitution say about the right to a speedy and public trial?**

A. *The Sixth Amendment states, among other things, that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."*

**Q. Why is there a right to a speedy trial?**

A. *As stated in* United States v. Ewell, *383 U.S. 116 (1966), this guarantee promotes fairness in the criminal judicial process.* It is generally the policy of the law that criminal cases be disposed of promptly. A speedy trial is an important safeguard to prevent undue and oppressive incarceration prior to trial. The provision also serves to limit the possibility that a long delay will impair the ability of an accused to defend himself. Long periods of delay may lead to the loss of witnesses and the fading of the memories of available witnesses. Inordinate delays in bringing an accused to trial also may cause disruption of employment, drain of financial resources, and anxiety on the part of his family and friends.

**Q. What constitutes a "speedy trial"?**

A. The Constitution does not fix an exact time within which a trial must begin to satisfy the requirement of a speedy trial. *Generally, a speedy trial is a trial which is begun as soon as the prosecution, with reasonable diligence, can prepare for it and which is free from arbitrary and oppressive delays.* The time period

within which the trial must begin to satisfy the constitutional provision (as opposed to statutory) depends on the circumstances. States have generally adopted statutes which specify the time period which is allowed to lapse before a trial of the accused has commenced.

Although the United States Supreme Court has not discouraged lower courts from attempting to establish specific time limits for trials, it also stated in *Barker v. Wingo*, 407 U.S. 514 (1972), that "we do little more than identify some of the factors which the courts should assess in determining whether a particular defendant has been deprived of his right." Thus, speedy trial cases are generally decided on a case-by-case basis.

**Q. Is the right to a speedy trial an absolute right?**

A. *No, it is relative and depends upon the circumstances surrounding the delay*. In *United States v. Durham*, 413 F.2d 1003 (5th Cir.), *cert. denied*, 369 U.S. 839 (1969), where the prosecution had shown that the delay was unavoidable because it needed time to prepare its case, the right to a speedy trial had not been violated. Also, the right to a speedy trial applies only to the initial trial and not to the appeal.

**Q. When has the right to a speedy trial been denied?**

A. *Unreasonable delays which are caused by the prosecution without justification and without fault or consent of the accused, violate the speedy trial guarantee*. No length of time, in and of itself, is too long to deny the accused his right to a speedy trial. The defendant does not need to show that he was actually disadvantaged by the delay. Rather, the determination is made by balancing the rights of the accused and the rights of public justice. Four factors which have been identified in the assessment of a violation include: (1) length of delay; (2) reason for the delay; (3) defendant's claim of his right to a speedy trial and; (4) disadvantage of the defendant.

**Q. What is the result of a denial of the accused's right to a speedy trial?**

A. *If the accused's right to a speedy trial has been denied, the case against the accused should be dismissed.* This generally requires that the defendant complain that there has been a delay which was not caused or consented to by him. If the prosecution cannot show good cause for the delay, dismissal is required as it is the only remedy if a speedy trial has been denied.

**Q. When does the prosecution "start" for purposes of applying this Sixth Amendment guarantee?**

A. *According to* Dillingham v. United States, *423 U.S. 64 (1975), prosecution begins when the accused has been arrested or charged with an offense.*

**Q. Must the delay be purposeful on the part of the prosecution?**

A. *Some decisions have indicated that the delay must be purposeful or oppressive on the part of the prosecution. The Supreme Court in* Strvak v. United States, *412 U.S. 434 (1973), has also said that unintentional delays are to be weighed less stringently than intentional delays.*

**Q. Must the defendant prove that his case has been hurt by the delay?**

A. *Normally, the accused must show that his case has been harmed by the delay.* If the delay is substantial, such harm or "prejudice" may be presumed, and it is then up to the prosecution to show that no prejudice has resulted from the delay. However, under a statutory provision the defendant may not need to show harm.

**Q. How can a defendant show that he has been hurt by the delay?**

A. *The loss of a key witness because of delay is probably the best way to prove injury to one's case resulting from denial of the right to a speedy trial.*

**Q. Where a delay is caused by the defendant, will such time period be considered in determining whether a speedy trial was denied?**

A. *No.* Where the delay is attributable to the trial or post-trial tactics of the defendant, no objection can be made. Similarly, where the delay is caused by the fact that the accused is a fugitive from justice or by the physical or mental incapacity of the defendant, such delay will not be considered in determining the speediness of the trial.

**Q. When does the time for trial end?**

A. *The time for trial ends with sentencing.* Therefore, if there is an over-long and unjustified delay between a finding of guilt and sentencing, the right to a speedy trial may have been denied.

**Q. If a person is confined in one state and is an accused of another state, will his right to a speedy trial be denied if the other state waits until he is released from his first confinement before prosecuting him on the second charge?**

A. *Yes.* Because sentences for different charges can be served at the same time, waiting for release from one confinement before prosecuting the defendant for a second charge can prejudice the defendant.

**Q. Must an accused "demand" a speedy trial in order to preserve his right to one?**

A. *No, although a demand is still advisable.* In *Barker v. Wingo*, 407 U.S. 514 (1972), the United States Supreme Court held that a waiver of the right to a speedy trial cannot be presumed from inaction. However, the Court also said that the absence of a demand is "one of the factors to be considered in an inquiry into the deprivation of the right."

**Q. What if the accused enters a plea of guilty?**

A. *This amounts to a waiver of the right to a speedy trial.*

**Q. Has Texas enacted any laws setting time limits for a speedy trial?**

A. *Yes.* These enactments are codified in Article 32A of the Code of Criminal Procedure. The

Code provides for specific times for the beginning of a criminal action, but also provides exceptions for special situations such as when the accused is absent from the state or incapable of standing trial. The effect of a violation of the provision by the State is that the defendant is discharged, and the discharge prevents any further prosecution of the offense discharged or any other offense arising out of the same facts.

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**Q. What is the purpose of the Sixth Amendment's guarantee of the right to a public trial?**

A. *The right to a public trial is a safeguard against any attempt to use our courts as instruments of persecution.* The Sixth Amendment guarantee serves to increase public confidence in our judicial system and to provide notice to potential witnesses who might provide important testimony. Criminal trials which have been conducted in closed court proceedings throughout history, today, symbolize a menace to liberty. The guarantee is recognized as a safeguard against attempts to use courts as tools of unjust condemnation.

"ALTHOUGH THE COURT IS WILLING TO PERMIT TELEVISION CAMERAS IN THE COURTROOM, WE WILL DRAW THE LINE AT-AH- EXCESSES..."
HOWARD, IT LOOKS LIKE THE CALL IS ON THE DEFENSE FOR BADGERING THE WITNESS-
-AND A PURELY PROVIDENT CALL IT WAS, DANDY- JUST LOOK AT THAT INSTANT REPLAY- HE WAS REALLY BROWBEATING HER-
-SO WHILE THERE'S A BREAK IN THE ACTION, WE'LL BE BACK WITH MORE'S RIGHT LITIGATION RIGHT AFTER THIS MESSAGE-
BEN SARGENT-

**Q. Can the press be excluded from a trial?**

A. *Yes, but only if the presence of the press constitutes a disruptive influence, or if exclusion is reasonably necessary to minimize the effects of prejudicial pretrial publicity*. Thus, the United States Supreme Court allowed a court in *Sheppard v. Maxwell*, 384 U.S. 333 (1966), to limit the number of reporters in the courtroom at the first sign that their presence will disrupt the trial. The conduct of reporters in the courtroom can be regulated where the regulation is not repugnant to the First Amendment.

**Q. Can the public invoke the Sixth Amendment guarantee?**

A. *No*. The right is personal to the accused. However, since the decision of *Garret Co., Inc. v. DePaguale*, 443 U.S. 368 (1979), the public may invoke its right to obtain information under the First Amendment.

**Q. May an accused demand a private trial under the Sixth Amendment?**

A. *No*. However, the accused may have a due process right to private hearings on such things as pre-trial motions to exclude evidence.

# THE EIGHTH AMENDMENT

## EXCESSIVE BAIL

**Q. What does the Eighth Amendment to the United States Constitution say about excessive bail?**

A. *The Eighth Amendment states: "excessive bail shall not be required. . . ."*

**Q. What is the purpose of bail?**

A. *The purpose of bail is to prevent the pre-trial incarceration of innocent persons and at the same time to compel their presence when required.* The main objective of bail is to secure the presence of the person charged with the crime at his trial, or at any other times when his presence may be required by the court.

After being charged with the crime, the accused usually has the right to post a bond in order to be released from jail. There are generally four types of bonds for State offenses: cash, property, surety, and personal recognizance bonds. A cash bond is where the entire amount of the bond is deposited with the sheriff's office and is refunded after the case is over. A property bond requires unencumbered property (that which has no liens or debts against it) usually in twice the amount of the bond to be approved by the sheriff.

A surety bond is similar to an insurance policy, in that to get out of jail a non-refundable premium, in effect, sometimes referred to as "bail", of ten to fifteen percent of the bond is paid to the bonding company, the bonding company then guarantees the rest of the bond to the sheriff should the accused fail to appear at trial. A fourth way to be released from jail after arrest is for the judge of the appropriate court to release the accused on his personal recognizance, which means that the court will trust him to appear for trial.

In Texas the only times an accused may not post bond are when a motion to revoke probation has been filed on one who is presently on probation, when one is accused of having committed a capital crime, or when the accused is a repeat offender. Except for these three instances, if there is no bond set, or if the ac-

cused is unable to afford bond because it is too high, a lawyer may get a judge to set a bond or perhaps lower a bond by a writ of habeas corpus. Otherwise, the accused will usually remain in the custody of the arresting law enforcement agency until the disposition of his case.

**Q. What is the effect of granting bail?**

A. *Bail permits the release of an accused from custody*. When on bail, a person is not physically under any restraint and generally he is free to come and go at will within a certain geographic location.

**Q. What is "excessive" bail?**

A. *"Excessive" bail means that the amount of bail is more than necessary to secure the attendance of the person requesting bail*. According to *Stack v. Boyle*, 342 U.S. 1 (1951), bail is excessive when it is set at an amount higher than that reasonably calculated to insure that the accused will appear.

There are no set rules for determining what is reasonable bail and what is excessive bail. Bail must not be set at an amount which is more than the accused can reasonably be expected to give under the circumstances. Bail can be excessive regardless of whether or not the accused has the financial ability to furnish bail at the amount at which it has been set. However, the financial ability of the accused to furnish bail in the amount set will largely determine whether or not it is excessive.

The mere fact that the accused cannot make bail in the amount set does not necessarily mean that the amount is excessive. There are other considerations relating to the risk of nonappearance which may affect the amount of the bond, such as roots in the community, employment, prior criminal record, the probability of conviction and the likely sentence. The amount of bail, in and of itself, is not finally determinative of excessiveness. What would be a reasonable bond to one accused might be excessive to another in different circumstances.

## CRUEL AND UNUSUAL PUNISHMENT

**Q. What does the Eighth Amendment say about the punishments which may be imposed on convicted offenders?**

A. *The Eighth Amendment mandates that "cruel and unusual punishments" not be inflicted.* However, it is difficult to define with precision what constitutes cruel and unusual punishment in the constitutional sense. The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Generally, the prohibition applies to punishments which would shock the minds of people with ordinary feelings of humanity according to contemporary standards of developing civilization.

**Q. What are the criteria used for determining what is cruel and unusual punishment?**

A. *What in any particular case constitutes a cruel and unusual punishment depends on the facts and circumstances of the punishment itself and the nature of the act to be punished.* In *Furman v. Georgia*, 408 U.S. 238 (1972), the United States Supreme Court announced four basic principles to be used in assessing the constitutionality of a particular punishment.

First, it is required that the punishment not be unusually severe. Basically, punishments which by their excessive length or severity are greatly disproportionate to the offense charged are prohibited under this criterion.

Secondly, there must not be a strong probability that the punishment will be inflicted arbitrarily. Any criminal penalty should be imposed in a consistent and rational manner. The government must not, without reason, inflict on some people a severe punishment that it does not inflict upon others. This is not to say that all punishments should be the same though, because the proper reason may be the background of each accused or the particular case.

Third, the punishment must not be substantially rejected by contemporary society. This should be evaluated in light of the standards of developing civilization. This criterion is based on the fundamental concept that even the vilest criminal is still a human being, possessing common human dignity.

Finally, the punishment must serve some penal purpose more effectively than some less severe punishment. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is in-

flicted, the punishment is unnecessary and excessive. In principle, the Eighth Amendment prohibits the pointless infliction of suffering.

**Q. Is the death penalty prohibited as cruel and unusual punishment?**

A. *No*. The death penalty, in and of itself, is not prohibited as cruel and unusual punishment. However, the death must be inflicted with speed and without undue pain or torture and must meet the other criteria outlined above. Where a statute fails to comply with these criteria, it will be stricken down as in *Furman v. Georgia*, 408 U.S. 238 (1972). The Court in *Furman* rules that the procedure for imposing the death penalty under Georgia law allowed defendants to be discriminated against on the basis of race. Death penalty statutes which are administered arbitrarily or discriminatorily violate the Eighth Amendment.

In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court held that the death penalty was not an appropriate punishment for the offense of rape of an adult woman. The court found that the punishment of death for this offense was contrary to the standards of modern society. Of major importance to the Court's decision was that rape does not involve the taking of another human life.

# FOURTEENTH AMENDMENT

## DUE PROCESS IN CRIMINAL PROCEEDINGS

### BACKGROUND

**Q. What does the United States Constitution say about "due process of law"?**

A. *A fundamental principle of American law is that anyone accused of a crime is entitled to "due process of law." This principle is expressed in the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment, provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment states: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."*

**Q. What is "procedural" due process?**

A. *As its name suggests, "procedural" due process refers to the procedures employed in a legal proceeding. Procedural due process refers to the formal steps of the proceeding or the machinery used to carry on the proceeding.* For example, two essential elements of procedural due process provide that individuals accused of crimes are entitled to notification of the specific accusations made against them and to be afforded an opportunity for a hearing in an impartial forum. To eliminate an essential

step in a legal proceeding is to deny the accused procedural due process.

**Q. What is "substantive" due process?**

A. *"Substantive" due process involves the notion that an individual may not be deprived of life, liberty, or property for arbitrary or unreasonable reasons.* An individual who is, for example, found guilty of violating a law that is later held to be unreasonably harsh or broad may be said to have been denied substantive due process. A legal proceeding may be found to be substantively defective even though all of the required steps are followed. Taking away an individual's freedom for arbitrary or unreasonable reasons is a denial of substantive due process.

**Q. How did the concept of due process of law find its way into American law?**

A. *It has been said that the content of due process is a historical product. The phrase "due process of law" has acquired its present meaning over time, as legislatures and courts redefined and refined the term case-by-case and year-by-year.* As a result of legislative and judicial tinkering with the phrase, its present and past meanings are, in several respects, quite different.

The concept of due process derives from Chapter 39 of the Magna Carta, in which King John promised that "[n]o free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." The actual phrase "due process of law" first appeared in 1354 in a statutory rendition of Chapter 39 of the Magna Carta. Throughout the Fourteenth Century, parliamentary statutory interpretation and reinterpretation of this phrase expanded its meaning. Eventually, the phrase found its way into the writings of Sir Edward Coke, who, in his *Institutes of the Laws of England, Part II* (London: 1641), wrote that the term "by the law of the land" which appeared in the Magna Carta was equivalent to "due process of law."

The founders of the American constitutional system and those who authored the Fourteenth

Amendment derived their understanding of the concept of "due process of law" from Sir Coke. Early colonial charters used the phrase "law of the land," but this phrase eventually gave way to "due process of law."

## ELEMENTS OF DUE PROCESS

**Q. What is the first requirement of procedural due process?**

A. *If a person is to be able to avoid breaking the law, he must have a reasonable opportunity to know what the law commands. Therefore, when governmental bodies write laws and ordinances, they must use words and sentences that are sufficiently clear to ensure that those persons who will be subject to the law or ordinance know what they mean.* Statutes which are found to be unreasonably ambiguous may be struck down under the "void for vagueness" doctrine.

The requirement that legislative bodies, in creating crimes, must define them with such explicit definiteness that persons will not unknowingly engage in forbidden conduct was well stated in *Connally v. General Construction Company*, 269 U.S. 385 (1926), where the United States Supreme Court said:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.

In *United States v. National Dairy Prod. Corp.*, 372 U.S. 29 (1963), the Court held that before criminal responsibility may attach one must be able to reasonably understand that his contemplated conduct is proscribed.

**Q. How can a statute be invalidated under the "vagueness" doctrine?**

A. *A statute can be held void "on its face" or "as applied."* To invalidate a statute "on its face" is to conclude that the statute is so lacking in the required specificity and clarity that it cannot constitutionally be applied to anyone under any circumstances. To conclude that a statute is unconstitutional "as applied," on the other hand, is simply to conclude that under the circumstances of the particular case under review, the statute does not meet due process requirements. A statute may be found to have been unconstitutionally applied in a particular instance and still be legally applied in other instances.

Courts have often relied upon the "void for vagueness" doctrine to hold unconstitutional, on due process grounds, legislation that contained unclear language. In *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), for example, the United States Supreme Court invalidated a statute that provided that any person not engaged in a lawful occupation and known to be a member of any "gang" consisting of two or more persons, who had been convicted at least three times of being disorderly, or who had been convicted of any crime in that or any other state, was considered a "gangster" and subject to fine or imprisonment.

The Court observed that neither the words "gang" or "gangster" nor the phrase "known to be a member" were specifically defined, and that the enforcing agencies had broad discretion to give meaning to these terms. In effect, the Court concluded that no reasonable person could be expected to read the statute and understand what conduct it prohibited.

In *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), the Court dealt with a city ordinance which punished:

> Dissolute persons who go about begging . . . common night walkers . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers . . . persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where

alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children. . . .

A unanimous Court held that the ordinance was invalid because it did not provide fair notice, did not require specific intent to commit an unlawful act, permitted and encouraged arbitrary and erratic arrests and convictions, committed too much discretion to policemen, and made criminal certain activities which normally would be considered innocent.

In summary, legislative enactments must reasonably inform those to whom they apply that certain conduct is illegal. Devices do exist which allow courts to uphold borderline legislation, but statutes which are so ambiguous that men of common intelligence will not understand their meaning and will differ as to their application, will normally be held unconstitutional under the "void for vagueness" rationale.

**Q. Why would an accused wish to plead guilty?**

A. *Instead of insisting that the prosecution prove him guilty, however, a defendant may choose to plead guilty. He may decide to do so for several reasons. A defendant may, for example, feel that the evidence against him is overwhelming. He may conclude that even though the evidence is marginal and he could be acquitted, his sentence may be much more severe if he is found guilty than if he simply pleads guilty, especially if there is a "plea bargain."* "Plea bargaining" is a legal process in which the prosecutor and defense attorney agree to allow the defendant to plead guilty to the offense with an agreed punishment or to a less serious offense in order for both sides to avoid the time and expense of a trial.

The United States Supreme Court in *North Carolina v. Alford*, 400 U.S. 25 (1971), decided that the government may not structure its system so as to coerce a guilty plea, but one entered voluntarily, knowingly, and understandingly is allowed under the Constitution. Before accepting a plea of guilty from a defendant, the trial judge must talk with the defendant personally and determine that the plea is made voluntarily and with understanding of the nature of

the charge and the consequences of the plea.

A failure to follow this requirement invalidates the plea and entitles the defendant to plead again. For example, in *Henderson v. Morgan*, 426 U.S. 637 (1976), the Court held that a defendant charged with first degree murder who elected to plead guilty to second degree murder had not voluntarily entered the plea because neither his counsel nor the trial judge had informed him that an intent to cause the death of the victim was an essential element of guilt. There was therefore no showing that the defendant knowingly was admitting that intent. The Court stated that "a plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving . . . or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt."

COME RIGHT IN, SIR, AND LET'S SEE HOW WE MIGHT OIL THE WHEELS OF JUSTICE WITH A LITTLE FREE GIVE-AND-TAKE!
PLEA BARGAINING DESK
DEFENDANT
BEN SARGENT-

**Q. What are the requirements of a valid guilty plea?**

A. *The primary requirement for the validity of a guilty plea is that it be made voluntarily*. This was explained by the U.S. Supreme Court in *Boykin v. Alabama*, 395 U.S. 238 (1969), wherein it ruled that the record must show an intelligent and understanding relinquishment of three federal constitutional rights: the privilege against self-incrimination, the right to a trial by

jury, and the right to confront one's accusers, (that is, the right to cross-examine the witness against oneself). A guilty plea is not rendered involuntary because the prosecutor threatens a defendant with more charges or a stiffer penalty unless he pleads guilty. The Supreme Court approved this in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

**Q. Is a plea of guilty which is given in exchange for a promise from the prosecutor valid?**

A. *Yes, but if a guilty plea rests to any significant extent upon a promise or agreement of the prosecutor, so that the promise was part of the inducement to plead guilty, that promise must be kept.* In *Santobello v. New York*, 404 U.S. 257 (1971), the prosecutor and defense counsel had reached agreement on a guilty plea in return for a "no-sentence" recommendation by the prosecutor. At the sentencing hearing held months later, however, a different prosecutor recommended the maximum sentence possible under the statute, which the judge imposed. The Court ruled that the prosecutor's entire staff was bound by the promise made earlier to the defendant.

**Q. What is a "fair" trial?**

A. The Constitution entitles the accused a "fair" trial. *The United States Supreme Court observed in* Lisenba v. California, *314 U.S. 219 (1941), that a fair trial is one that affords an accused "that fundamental fairness essential to the very concept of justice."* The due process clause will be held to have been violated where the trial proceedings do not comport with this standard.

A fair trial, however, is not the same thing as a perfect trial. Some errors that occur during trials are so unimportant and insignfiicant, either in themselves or in the context of evidence pointing overwhelmingly to the defendant's guilt, that they can be considered harmless and do not result in reversal of a conviction. It would be a substantial miscarriage of justice to reverse a conviction simply because some trivial error occurred during the trial. In order to prevent this from happening, courts developed the "harmless error" rule.

Bias or prejudice inherent in the structure of the trial system or imposed by external events will deny one's right to a fair trial. Thus, in *Tumey v. Ohio*, 273 U.S. 510 (1927), the Court held that due process was denied where the offenders were tried before a judge who, in addition to his salary, received the costs imposed on the defendant in case of conviction and who was also mayor of the municipality which received part of the money collected in fines.

In *Frank v. Mangum*, 237 U.S. 309 (1915), the Court found that "mob" domination of a trial resulted in a classic due process violation, because the effect of such domination was to rob the jury of its ability to evaluate carefully and impartially the evidence presented at the trial. Concern with the impact of prejudicial publicity upon jurors and potential jurors has caused the United States Supreme Court to instruct trial courts that they should make a diligent effort to guard against such prejudice and to prevent both the publicity and the jury's exposure to it.

**Q. May the prosecution withhold evidence from the defendant and his attorney?**

A. *No, not if the evidence would tend to show that the defendant is not guilty*. An accused is denied his right to due process where he is convicted because of evidence known to the prosecuting attorneys to have been perjured. The United States Supreme Court held in *Mooney v. Holahan*, 294 U.S. 103 (1935), that a conviction obtained by means of perjured testimony "is inconsistent with the rudimentary demands of justice as is obtaining a like result by intimidation." For example, in *Napue v. Illinois*, 360 U.S. 264 (1959), the main prosecution witness was the defendant's accomplice, and he testified that he had received no promise of consideration in return for his testimony. In truth, the prosecutor had made such a promise, but he did nothing to contradict the false testimony.

In *Alcorta v. Texas*, 355 U.S. 28 (1957), wherein a husband killed his wife because of her infidelity, a prosecution witness testified that he had told the prosecutor that he had been intimate with the woman but that the prosecutor had told him to say nothing about that at the trial. At the trial, the witness had only testified that he had had a casual relationship with

the woman. In both cases, the convictions were overturned.

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." That case involved an out of court confession of a defendant's accomplice that he had actually committed the murder. Had this confession been known to the jury, its decision on the defendant's sentence (although not their decision on the defendant's guilt) might have been different.

In *Moore v. Illinois*, 408 U.S. 786 (1972), however, the convicted defendant claimed that the prosecution had suppressed testimony and evidence that would have discredited the trial testimony of certain witnesses. Prior to the trial, defendant's counsel had sought to discover any statements given to the prosecutor or to police by any witness with information relevant to the case. The prosecutor instead offered to make his files available to the defendant's counsel.

Some of the items which the defendant deemed critical to his case were not in the files but were known to police officers who assisted the prosecution at the trial. The United States Supreme Court held that no due process violation had occurred. It found that three factors must be taken into account in determining whether such a violation has occurred: (1) suppression by the prosecution after a request by the defense; (2) the evidence's favorable character for the defense; and (3) the materiality of the evidence.

The Court held, in a five-to-four decision, that all of these requirements were not satisfied. In particular, it held that the material allegedly suppressed was not critical to the issue of the identification of the defendant as the killer, but related only to a confusion in other situations of the defendant with someone else.

In *United States v. Agurs*, 427 U.S. 97 (1976), the Court summarized and expanded the prosecutor's obligation to disclose to the defense evidence in his possession which would exonerate the defendant. If the prosecutor knew or should have known that testi-

mony given at the trial was perjured, th conviction must be set aside if there is any rea sonable likelihood that the false testimor could have affected the jury's judgment.

Secondly, if the defense specifically re quested certain evidence and the prosecutc withheld it, the conviction cannot stand if the suppressed evidence might have affected the outcome of the trial.

Finally, if the defense did not make a request, or simply asked for "anything exculpatory," the prosecution has a duty to reveal to the defense obviously exculpatory evidence. If the prosecution does not reveal it, the conviction may be reversed, but only if the undisclosed evidence creates a reasonable doubt as to the defendant's guilt.

**Q. Must the prosecution establish the defendant's guilt?**

A. *Due process requires that the State prove one's guilt "beyond a reasonable doubt."* In reviewing state cases, the United States Supreme Court will review the sufficiency of the evidence adduced at trial and enter an acquittal where no reasonable juror, after hearing the evidence at trial, could have found the defendant guilty beyond a reasonable doubt.

Statutory presumptions are permissible. This allows states to enact statutes which provide that certain facts may be presumed to exist if other facts are established. If a statute creates an arbitrary presumption, however, or if it denies an accused a fair opportunity to rebut the presumption (offer evidence that established the invalidity of the presumption) due process is denied.

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the United States Supreme Court concluded that since the due process clause requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged, a defendant charged with murder could not be required to prove that he acted "in the heat of passion on sudden provocation" in order to reduce the homicide to manslaughter. In *Rivera v. Delaware*, 429 U.S. 877 (1976), the Court summarily rejected the argument that the prosecution has to negate the insanity defense.

**Q. How does incompetency enter into the due process picture?**

A. *When it becomes apparent during a trial that a defendant is or has become insane, or incompetent to stand trial, the trial court is obliged to conduct a hearing on the issue according to* Pate v. Robinson, *383 U.S. 375 (1966). The notion is that it would violate due process to try as a criminal a person who is insane or incompetent to stand trial.*

When the state determines, however, that an accused is incompetent to stand trial, he cannot be committed indefinitely for that reason. The court may commit him to no longer a period than is necessary to determine whether there is a substantial probability that he will regain his capacity to stand trial in the foreseeable future. The state must institute a civil commitment proceeding where it must be determined that the defendant will not regain his competency.

It is also generally assumed that due process would be violated where the state executes a prisoner who has become insane or incompetent following conviction. The Court has, however, held in *Solesbee v. Balkcom*, 339 U.S. 9 (1950), that due process is not violated when the governor of a state is allowed to make the determination as to whether a prisoner sentenced to death is insane at the time of the scheduled execution.

**Q. What due process standards apply at the sentencing stage of a trial?**

A. *The requirements of due process at the sentencing stage are vague.* In *Townsend v. Burke*, 334 U.S. 736 (1948), the United States Supreme Court overturned a sentence imposed by a judge who, in reciting the defendant's record from the bench, made several errors and comments. The Court found that the defendant was, to a great extent, sentenced on the basis of assumptions concerning his criminal record that were largely inaccurate.

In *Williams v. New York*, 337 U.S. 241 (1949), the judge imposed the death penalty even though the jury had recommended leniency. The judge indicated that he had based his decision upon information in the presentence report. The Court decided that it would be

undesirable to restrict the judge's discretion in sentencing by requiring adherence to formal rules of evidence. The Court in *Mempha v. Rhay*, 389 U.S. 128 (1967), held that when sentencing is deferred subject to probation and the terms of probation are allegedly violated so that the defendant is returned for sentencing, he must then be represented by counsel.

**Q. What rights of appeal exist?**

A. *The due process clause does not require an appeal from a judgment of conviction. The United States Supreme Court in* McKane v. Durston, *153 U.S. 684 (1894), left it up to each state to allow or not allow appellate review.* The Court has also held, however, that when a state provides appellate review, it may not attach so many conditions to the privilege that due process will be denied for irrational reasons.

This does not mean, however, that a state may afford no correctional procedures. In *Frank v. Mangum*, 237 U.S. 309 (1915), the Court stated: "And if the State, supplying no corrective process, carries into execution a judgment of death or imprisonment based upon a verdict thus produced by mob domination, the State deprives the accused of his life or liberty without due process of law."

Other cases have observed that the absence of corrective process of some kind when the convicted defendant alleges a federal constitutional violation contravenes the Fourteenth Amendment. The method by which federal constitutional rights are to be vindicated after conviction is for the government to decide. If a state provides some means of redress, a defendant must first use that method and then, if unsuccessful, he may seek relief in federal court.

If there is no adequate remedy in state court, he may petition a federal court for relief through a writ of habeas corpus. When appellate or another corrective process is made available, it must not deny the convicted due process of law.

**Q. Are the rules different for youthful offenders?**

A. *Yes, but many of the same requirements apply.* All states have different means of dealing with

persons under a certain age who have allegedly committed an offense which, if committed by an adult, would be criminal. Until a few years ago, however, juvenile proceedings did not have to be conducted in accordance with due process requirements. This was justified on the ground that juvenile courts were civil, not criminal, and that in dealing with youthful offenders, the state was acting as *parens patriae* (essentially, in the place of the parents) and was not an adversary.

In the case of *In re Gault*, 387 U.S. 1 (1967), the United States Supreme Court, in a landmark decision, held that the application of the due process clause to juvenile proceedings would not negate the positive features of the juvenile system. As the Court observed, "[u]nder our Constitution, the condition of being a boy does not justify a kangaroo court." Thus, the Court held that notice of charges must be given in time for the juvenile to prepare a defense, a hearing must be afforded in which the juvenile could be represented by counsel, the constitutional rights of confrontation and cross-examination must be afforded, and the juvenile must be protected against self-incrimination.

Earlier, the Court had held in *Kent v. United States*, 383 U.S. 541 (1966), that before a juvenile could be tried in an adult court, there had to be a hearing. Later, the Court held that due process requires that a juvenile be found delinquent only on evidence beyond a reasonable doubt when the offense charged would be a crime if committed by an adult. However, in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), the Court held that jury trials are not constitutionally required in juvenile trials.

**Q. What is the basis for the decisions finding abortions to be a protected right under the due process clauses?**

A. *The United States Supreme Court has determined that the constitutional right of privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.* Even though the right to privacy is not specifically mentioned in the Bill of Rights, the Court has held the right of privacy to be within the concept of personal liberty and restrictions upon state actions which are embodied in the Fourteenth Amendment. Other courts have de-

termined the right of privacy to be found in the Ninth Amendment, which reserves rights to the people.

**Q. When does a woman have the constitutional right to terminate her pregnancy?**

A. A woman's absolute constitutional right to an abortion during the first three months of pregnancy was recognized by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973). Furthermore, the Court prohibited the states from regulating effectuation of an abortion during those first three months. The Court left any decisions about the abortion procedure during that period to the woman and her physician.

During the second trimester (3-6 months) of pregnancy, the woman still has a fundamental right to have an abortion. However, after the third month and continuing through the ninth month, the state may regulate the abortion procedure in ways that are reasonably related to maternal health. Examples of permissible state regulations include requirements as to the qualification of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed; and the like.

However, at the point in time when the fetus become "viable", the state is free to regulate and even prohibit abortion. The Court in *Roe* defined "viability" as "the capability of meaningful life outside the mother's womb." The Court refrained from specifying a time for viability because it recognized that the definition must change as medical technology advances. Moreover, the Court defined viability so as to include the maintenance of the fetus on artificial life support systems. A fetus generally will become viable sometime during the twenty-eighth week of pregnancy, but not necessarily. The state cannot at any time prohibit an abortion where it is necessary for the preservation of the life or health of the mother.

**Q. What state regulation of abortion has been allowed?**

A. *Some state regulation has been permitted where a minor or a potential viable fetus is involved.* In *H.L. v. Matheson*, 450 U.S. 39

(1981), the Court affirmed a Utah statute which required that parents be notified, if possible, that their minor child is going to have an abortion. Because the statute gave no veto to the parents and because there was no claim in *Matheson* that the child was so mature and that she did not need parental guidance, the statute was sustained a means of preserving family integrity and assuring that the physician received all relevant information.

A Missouri statute which required, during abortions performed after viability, the attendance of a second physician who was responsible for preserving the life of the fetus, was held to be constitutional by the United States Supreme Court in *Planned Parenthood Association of Kansas City, Missouri v. Ashcroft*, ___ U.S. ___(1983). The Missouri statute requiring a pathology report to be filed after every abortion was also held to be constitutional in that case.

**Q. What state regulations of abortion have not been allowed?**

A. *Those regulations which unduly restrict a woman's right to an abortion have been struck down.* In *Bellotti v. Baird*, 443 U.S. 662 (1979), the United States Supreme Court struck down a Massachusetts statute which, in effect, required parental consent for a minor's abortion. The Court stated that there must be an alternative judicial procedure to parental consent by which a woman can demonstrate that she is mature enough and well-enough informed to make her own abortion decisions: even if she is not well-enough informed to make her own decision, there must be an alternative procedure to determine that an abortion would be in her best interest.

According to the decision in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), it is unconstitutional to require the husband's consent when a married woman wants an abortion. The United States Supreme Court has disallowed any statute which grants to a third party a veto power over the woman's decision to abort.

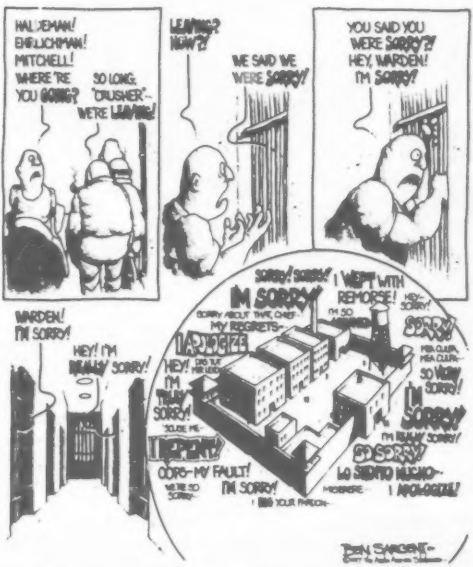
The Court also invalidated the statute which required abortions after the first trimester to be performed in a hospital in *City of Akron v. Akron Center for Reproduction Health, Inc.* ___U.S. _

(1983). The requirement was held to unreasonably infringe upon the woman's constitutional right to obtain an abortion without furthering the state's interest in protecting a woman's own health and safety. According to the decision in *Simopoulos v. Virginia*, ____U.S. ____(1983), a definition of "hospital" which included outpatient clinics meeting certain criteria was not unreasonable.

## EQUAL PROTECTION

**Q. What protection does the United States Constitution provide against discrimination?**

A. *The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the law."* The provision is concerned mainly with the acts of the legislatures or Congress which treat one group of citizens differently than it treats another.




**Q. May the states discriminate between classes of persons in certain situations?**

A. *Yes, if the distinction is important to a legitimate state interest.* In *McGowan v. Maryland*, 366 U.S. 420 (1961), the United States Supreme Court stated:

> [T]he Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

For example, in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), the Court rules that the state's statutory rape status, which applied only to men, did not violate the equal protection clause. Gender-based classifications will be upheld if they bear a fair and substantial relationship to legitimate state ends. The Court reasoned that because the purpose of the statute was to prevent teenage pregnancy, and only females can become pregnant, the gender-based classification was justified.

**Q. How can the right to equal protection affect criminal trials?**

A. *The equal protection clause prohibits the state from treating one group of defendants differently than it does another group of defendants without reason.* As the United States Supreme Court stated in *Griffin v. Illinois*, 351 U.S. 12 (1956):

> [O]ur own constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of the entire judicial system — all people charged with crime must, so far as the

law is concerned, stand on an equality before the bar of justice and every American Court.

**Q. How does the provision of equal protection affect private conduct?**

A. *The equal protection clause of the Fourteenth Amendment applies only to action which may fairly be said to be that of the states. The clause does not act as a shield against merely private conduct, even if it is discriminatory or wrongful.* However, many states have enacted statutes which do prohibit private discriminatory conduct. State statutes are particularly prevalent in the regulation of private employment procedures.

## HABEAS CORPUS

**Q. What is a "writ of habeas corpus"?**

A. *A "writ" is an order issued from a court requiring the performance of a specified act.* So a "writ of habeas corpus" orders a custodian (usually a sheriff or jailer) to produce a person who is in his custody before the court and to explain why that person is still being held in custody.

**Q. What is the purpose of obtaining a writ of habeas corpus?**

A. *The primary objective of the writ of habeas corpus is to determine the legality of the restraint under which a person is held.* It is designed to effect a speedy release of persons who are illegally deprived of their liberty.

**Q. When can the writ of habeas corpus be used?**

A. An actual or physical restraint is not always necessary to warrant interference by habeas corpus. *Although the writ can be used, for example, to secure the release on bond of an accused who is held with no bond or excessive bond, it can also be used to set illegal convictions aside even after the person has served his sentence.* This is allowed in *Carafas v. LaVallee*, 391 U.S. 234 (1968), because of the

continuing civil disabilities that flow from a conviction and criminal record.

## BILLS OF ATTAINDER AND EX POST FACTO LAWS

**Q. What does Article I of the United Constitution say about bills of attainder and ex post facto laws?**

A. *Article I, Section 9, Clause 3 states: "No Bill of Attainder or ex post facto Law shall be passed."*

**Q. What is a "bill of attainder"?**

A. *A Bill of Attainder is an exercise of judicial power by a legislative body.* The singling out of an individual for legislatively prescribed punishment constitutes a bill of attainder, whether or not the individual is named specifically or described in terms of conduct which operates as a designation of particular persons.

In *United States v. Brown*, 381 U.S. 437 (1965), a statute which made it a crime for a member of the Communist Party to serve as officer or employee of a labor union was held to be unconstitutional as a bill of attainder.

**Q. Why does the Constitution prohibit the passage of a bill of attainder?**

A. *The Bill of Attainder Clause is a further implementation of the separation of powers.* The prohibition acts as a safeguard against legislative exercise of judicial function, to prevent trial by the legislature. It reflects the belief that the legislature is not well suited to determine the blameworthiness and to assess punishment on specific persons.

**Q. What is an "*ex post facto* law"?**

A. *An* ex post facto *law operates retrospectively (affecting past events) to make a previously innocent act criminal, to aggravate or increase the punishment for a crime, to deprive an accused of some protection or defense previously available at the time of the alleged wrongful*

*conduct, or to otherwise alter his situation to his disadvantage.*

Generally, the prohibition against *ex post facto* laws applies only in criminal matters. An *ex post facto* law, in short, is a law which renders an act punishable in a manner in which it was not punishable when it was committed. A statute is *ex post facto* as to an offense only if it takes effect *after* the commission of that offense and works to the disadvantage of the accused.

For example, In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), Bouie and another man were convicted of criminal trespass under a statute which made "entry upon the . . . lands of another, after notice from the owner or tenant prohibiting such entry," a misdemeanor. They had not entered "after notice"; they had received no notice that entry was forbidden when they entered, but they were convicted for remaining after receiving notice to leave.

*After* they engaged in these acts the state supreme court held for the *first time* that the statute penalized remaining on land after notice to leave as well as entry on land after notice prohibiting entry. The state court applied this holding retroactively to affirm the defendant's convictions.

The United States Supreme Court held this was a violation of the prohibition against *ex post facto* laws. The Court found that an unforeseeable and retroactive judicial expansion of narrow and precise statutory language deprived the accused of a right to fair warning.